REORGANIZATION OF THE FEDERAL ADMINISTRATIVE JUDICIARY ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW
OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

H.R. 1802

REORGANIZATION OF THE FEDERAL ADMINISTRATIVE JUDICIARY ACT

JULY 26, 1995

Serial No. 12

Printed for the use of the Committee on the Judiciary

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REORGANIZATION OF THE FEDERAL ADMINISTRATIVE JUDICIARY ACT

WEDNESDAY, JULY 26, 1995

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL AND
ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2226, Rayburn House Office Building, Hon. George W. Gekas (chairman of the subcommittee) presiding.

Present: Representatives George W. Gekas, Bob Inglis, Michael Patrick Flanagan, and Jack Reed.

Also present: Charles E. Kern II, counsel; Rebecca Ward, secretary; and Agnieszka Fryszman, minority counsel.

OPENING STATEMENT OF CHAIRMAN GEKAS

Mr. GEKAS. The hour of 10 o'clock having arrived, this hearing of the Subcommittee on Commercial and Administrative Law of the Judiciary Committee is now in session.

In accordance with the rules of the House, we cannot begin the hearing until we have a quorum. A quorum for this hearing would constitute two members. The Chair is here and upon the arrival of a second Member, we will commence the hearing.

So, as of now, notwithstanding the presence of Senator Heflin, we must recess until the appearance of a second member.

[Recess.]

[The bill, H.R. 1802, follows:]

I

104TH CONGRESS
1ST SESSION

H. R. 1802

To reorganize the Federal administrative law judiciary, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 8, 1995

Mr. GEKAS (for himself, Mr. BARRETT of Wisconsin, Mr. BEVILL, Mr. BONILLA, Mr. BONO, Mr. CALVERT, Mr. FRANK of Massachusetts, Mr. KANJORSKI, Mr. KLECZKA, Mr. INGLIS of South Carolina, Mr. SOLOMON, and Mr. GILMAN) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To reorganize the Federal administrative law judiciary, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Reorganization of the Federal Administrative Judiciary Act".

SEC. 2. FINDINGS.

The Congress finds that—

(1) in order to promote efficiency, productivity, the reduction of administrative functions, and to

provide economies of scale and better public service and public trust in the administrative resolution of disputes, Federal administrative law judges should be organized in a unified corps;

(2) the dispersal of administrative law judges appointed under section 3105 of title 5, United States Code, in every Federal agency that requires hearings to be conducted by administrative law judges, underutilizes the potential of administrative law judges to serve the public and assist the Federal courts as special masters and finders of fact in specific instances to help reduce the backlog of cases in Federal courts;

(3) the organization of administrative law judges in a corps will best promote their assignment to Federal agency needs as demand requires;

(4) a unified administrative law judge corps will better promote the use of information technology in serving the public; and

(5) an administrative law judge corps will, through consolidation, eliminate unnecessary offices and reduce travel and other related costs.

SEC. 3. ESTABLISHMENT OF ADMINISTRATIVE LAW JUDGE CORPS.

(a) IN GENERAL.—Chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new subchapter:

"SUBCHAPTER VI—ADMINISTRATIVE LAW JUDGE CORPS

"§ 597. Definitions

"For the purposes of this subchapter—

"(1) 'agency' means an authority referred to in section 551(1);

"(2) 'Corps' means the Administrative Law Judge Corps of the United States established under section 598;

"(3) 'administrative law judge' means an administrative law judge appointed under section 3105 on or before the effective date of the Reorganization of the Federal Administrative Judiciary Act or under section 599c after such effective date;

"(4) 'chief judge' means the chief administrative law judge appointed and serving under section 599;

"(5) 'Council' means the Council of the Administrative Law Judge Corps established under section 599b;

"(6) 'Board', unless otherwise indicated, means the Complaints Resolution Board established under section 599e; and

"(7) 'division chief judge' means the chief administrative law judge of a division appointed and serving under section 599a.

"§ 598. Establishment; membership

"(a) ESTABLISHMENT.—There is established an Administrative Law Judge Corps consisting of all administrative law judges, in accordance with the provisions of subsection (b). Such Corps shall be administered in Washington, D.C.

"(b) MEMBERSHIP.—An administrative law judge serving as such on the date of the commencement of the operation of the Corps shall be transferred to the Corps as of that date. An administrative law judge who is appointed on or after the date of the commencement of the operation of the Corps shall be a member of the Corps as of the date of such appointment.

"§ 599. Chief administrative law judge

"(a) APPOINTMENT; TERM.—The chief administrative law judge shall be the chief administrative officer of the Corps and shall be the presiding judge of the Corps. The chief judge shall be appointed by the President, by and with the advice and consent of the Senate. The chief

judge shall be learned in the law. The chief judge shall serve for a term of five years or until a successor is appointed and qualifies to serve. A chief judge may be reappointed upon the expiration of the term of such judge, by and with the advice and consent of the Senate.

"(b) VACANCIES.—(1) If the office of chief judge is vacant, the division chief judge who is senior in length of service as a member of the Council shall serve as acting chief judge until such vacancy is filled.

"(2) If 2 or more division chief judges have the same length of service as members of the Council, the division chief judge who is senior in length of service as an administrative law judge shall serve as such acting chief judge.

"(c) SPECIAL FUNCTIONS OF CHIEF JUDGE.—(1) In addition to other duties conferred on the chief judge, the chief judge shall be responsible for developing programs and practices, in coordination with agencies using administrative law judges, which foster economy and efficiency in the processing of cases heard by administrative law judges. These programs and practices shall include—

"(A) training of judges in more than one subject area;

"(B) employment of computers and software and other information technology for automated decision preparation, case docketing, and research;

"(C) consolidating hearing facilities and law libraries; and

"(D) programs and practices to foster overall efficient use of staff, personnel, equipment, and facilities.

"(2) In order to minimize costs—

"(A) all administrative law judges and support personnel shall, for at least 1 year after the date of the commencement of the operation of the Corps, continue to use the office space and facilities, at the agencies using such judges and personnel, available before such date, and

"(B) the chief judge shall phase in transfers of administrative law judges and support personnel to other facilities so that the cost of providing facilities for the Corps shall not exceed the cost of maintaining such judges and personnel in equivalent space available at agencies using the Corps.

"(d) REPORTS.—The chief judge shall, within 90 days after the end of each fiscal year, make a written report to the President and the Congress concerning the business of the Corps during the preceding fiscal year. The report shall include information and recommendations of the Council concerning the future personnel requirements of the Corps.

"(e) SERVICE AFTER TERM EXPIRES.—After serving as chief judge, an individual may continue to serve as an administrative law judge unless such individual has been removed from office in accordance with section 599e.

"§ 599a. Divisions of the Corps; division chief judges

"(a) ASSIGNMENT TO DIVISIONS.—Each judge of the Corps shall be assigned to a division by the Council, pursuant to section 599b. The assignment of a judge who was an administrative law judge on the date of commencement of the operation of the Corps shall be made after consideration of the areas of specialization in which the judge has served. Each division shall be headed by a division chief judge who shall exercise administrative supervision over such division.

"(b) DIVISIONS.—The divisions of the Corps shall be as follows:

"(1) Division of Communications, Public Utility, and Transportation Regulation.

"(2) Division of Safety and Environmental Regulation.

"(3) Division of Labor.

"(4) Division of Labor Relations.

"(5) Division of Health and Human Services Programs.

"(6) Division of Securities, Commodities, and Trade Regulation.

"(7) Division of General Programs.

"(8) Division of Financial Services Institutions.

"(c) APPOINTMENT OF DIVISION CHIEF JUDGES.—(1) The division chief judge of each division set forth in subsection (b) shall be appointed by the President, by and with the advice and consent of the Senate, and shall be learned in the law.

"(2) Division chief judges shall be appointed for 5-year terms, except that of those division chief judges first appointed, the President shall designate 2 such individuals to be appointed for 5-year terms, 3 for 4-year terms, and 2 for 3-year terms.

"(3) Any division chief judge appointed to fill an unexpired term shall be appointed only for the remainder of such predecessor's term, but may be reappointed as provided in paragraph (4).

"(4) Any division chief judge may be reappointed upon the expiration of his or her term.

"(5) Any judge, after serving as division chief judge, may continue to serve as an administrative law judge unless such individual has been removed from office in accordance with section 599e.

"§ 599b. Council of the Corps

"(a) IN GENERAL.—The policymaking body of the Corps shall be the Council of the Corps. The chief judge and the division chief judges shall constitute the Council. The chief judge shall preside over the Council. If the chief judge is unable to be present at a meeting of the Council, the division chief judge who is senior in length of service as a member of such Council shall preside at the meeting.

"(b) QUORUM; VOTING.—One half of all of the members of the Council shall constitute a quorum for the purpose of transacting business. The affirmative vote by a majority of all the members of the Council shall be required to approve a matter on behalf of the Council. Each member of the Council shall have one vote.

"(c) MEETINGS.—Meetings of the Council shall be held at least once a month at the call of the chief judge or by the call of one-third or more of the members of the Council.

"(d) POWERS.—The Council is authorized—

"(1) to assign judges to divisions and transfer or reassign judges from one division to another, subject to the provisions of section 599c;

"(2) to appoint persons as administrative law judges under section 599c;

"(3) to file charges seeking adverse action against an administrative law judge under section 599e;

"(4) to prescribe, after providing an opportunity for notice and comment, the rules of practice and procedure for the conduct of proceedings before the Corps, except that, with respect to a category of proceedings adjudicated by an agency before the effective date of the Reorganization of the Federal Administrative Judiciary Act, the Council may not amend or revise the rules of practice and procedure prescribed by that agency during the 2 years following such effective date without the approval of that agency, and any amendments or revisions made to such rules shall not affect or be applied to any pending action;

"(5) to issue such rules and regulations as may be appropriate for the efficient conduct of the business of the Corps and the implementation of this subchapter, including the assignment of cases to administrative law judges;

"(6) subject to the civil service and classification laws and regulations—

"(A) to select, appoint, employ, and fix the compensation of the employees (other than ad-

ministrative law judges) that the Council deems necessary to carry out the functions, powers, and duties of the Corps; and

"(B) to prescribe the authority and duties of such employees;

"(7) to establish, abolish, alter, consolidate, and maintain such regional, district, and other field offices as are necessary to carry out the functions, powers, and duties of the Corps and to assign and reassign employees to such field offices;

"(8) to procure temporary and intermittent services under section 3109;

"(9) to enter into, to the extent or in such amounts as are authorized in appropriation Acts, without regard to section 3709 of the Revised Statutes of the United States (41 U.S.C. 5), contracts, leases, cooperative agreements, or other transactions that may be necessary to conduct the business of the Corps;

"(10) to delegate any of the chief judge's functions or powers with the consent of the chief judge, or whenever the office of such chief judge is vacant, to one or more division chief judges or other employees of the Corps, and to authorize the redelegation of any of those functions or powers;

"(11) to establish, after consulting with an agency, initial and continuing educational programs to assure that each administrative law judge assigned to hear cases of that agency has the necessary training in the specialized field of law of that agency;

"(12) to make suitable arrangements for continuing education and training of other employees of the Corps, so that the level of expertise in the divisions of the Corps will be maintained and enhanced; and

"(13) to determine all other matters of general policy of the Corps.

"(e) OFFICIAL SEAL.—The Council shall select an official seal for the Corps which shall be judicially noticed.

"§ 599c. Appointment and transfer of administrative law judges

"(a) APPOINTMENT.—After the initial establishment of the Corps, the Council shall appoint new or additional judges as may be necessary for the efficient and expeditious conduct of the business of the Corps. Appointments shall be made from a register maintained by the Office of Personnel Management under subchapter I of chapter 33 of this title. Upon request by the chief judge, the Office of Personnel Management shall certify enough names from

the top of such register to enable the Council to consider five names for each vacancy. Notwithstanding section 3318, a vacancy in the Corps may be filled from the highest five eligible individuals available for appointment on the certificate furnished by the Office of Personnel Management.

"(b) LIMITATION ON JUDGE'S DUTIES.—A judge of the Corps may not perform or be assigned to perform duties inconsistent with the duties and responsibilities of an administrative law judge.

"(c) REASSIGNMENTS; DETAILS.—A judge or staff member of the Corps on the date of commencement of the operation of the Corps, and all new judges and staff members appointed by the Council, may not thereafter be involuntarily reassigned to a new permanent duty station if such station is beyond the commuting area of the duty station which is the judge's or staff member's permanent duty station on that date. A judge or staff member of the Corps may be temporarily detailed, once in a 24-month period, to a new duty station at any location, for a period of not more than 120 days.

"§ 599d. Jurisdiction

"(a) IN GENERAL.—Any case, claim, action, or proceeding authorized to be heard before an administrative law judge on the day before the effective date of the Reor-

ganization of the Federal Administrative Judiciary Act shall, on or after such date, be referred to the Corps for adjudication on the record after an opportunity for a hearing.

"(b) TYPES OF CASES.—An administrative law judge who is a member of the Corps shall hear and render a decision upon—

"(1) every case of adjudication subject to the provisions of section 553, 554, or 556;

"(2) every case in which hearings are required by law to be held in accordance with sections 553, 554, or section 556;

"(3) every other case referred to the Corps by an agency in which a determination is to be made on the record after an opportunity for a hearing; and

"(4) every case referred to the Corps by a court for an administrative law judge to act as a special master or to otherwise making findings of fact on behalf of the referring court, which shall continue to have exclusive and undiminished jurisdiction over the case.

"(c) REFERRAL OF CASES.—When a case under subsection (b) arises, it shall be referred to the Corps. Under regulations issued by the Council, the case shall be as-

signed to a division. The appropriate division chief shall assign cases to judges, taking into consideration specialization, training, workload, and conflicts of interest.

"(d) REFERRALS BY AGENCIES AND COURTS.—Courts are authorized to refer, subject to the approval of the majority of the Council and the parties in the court proceeding, those cases, or portions thereof, in which they seek an administrative law judge to act as a special master pursuant to the provisions of Rule 53(a) of the Federal Rules of Civil Procedure which shall continue to have exclusive and undiminished jurisdiction over the case. When a court has referred a case to an administrative law judge, the recommendations, rulings, and findings of fact of the administrative law judge are subject to de novo review by the referring court.

"(e) SATISFACTION OF OTHER PROCEDURAL REQUIREMENTS.—Compliance with this subchapter shall satisfy all requirements imposed under section 916 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

"(f) APPLICATION OF AGENCY POLICY.—The provisions of this subchapter shall effect no change in—

"(1) an agency's rulemaking, interpretative, or policymaking authority in carrying out the statutory responsibilities vested in the agency or agency head;

"(2) the adjudicatory authority of administrative law judges; or

"(3) the authority of an agency to review decisions of administrative law judges under any applicable provision of law.

"§ 599e. Removal and discipline

"(a) IN GENERAL.—(1) Except as provided under paragraph (2), an administrative law judge may not be removed, suspended, reprimanded, or disciplined except for misconduct or neglect of duty, but may be removed for physical or mental disability (consistent with prohibitions on discrimination otherwise imposed by law).

"(2) Paragraph (1) shall not apply to an action initiated under section 1215.

"(b) RULES OF JUDICIAL CONDUCT.—No later than 180 days after the appointment and confirmation of the Council, the Council shall adopt and issue rules of judicial conduct for administrative law judges. Such code shall be enforced by the Council and shall include standards governing—

"(1) judicial conduct and extra-judicial activities to avoid actual, or the appearance of, improprieties or conflicts of interest;

"(2) the performance of judicial duties impartially and diligently;

"(3) avoidance of bias or prejudice with respect to all parties; and

"(4) efficiency and management of cases so as to reduce dilatory practices and unnecessary costs.

"(c) DISCIPLINARY ACTION BY THE COUNCIL.—An administrative law judge may be subject to disciplinary action by the Council under subsection (j). An administrative law judge may be removed only after the Council has filed with the Merit Systems Protection Board a notice of removal and the Merit Systems Protection Board has determined on the record, after an opportunity for a hearing before the Merit Systems Protection Board, that there is good cause to take the action of removal.

"(d) COMPLAINTS RESOLUTION BOARD.—Under regulations issued by the Council, a Complaints Resolution Board shall be established within the Corps to consider and to recommend appropriate action to be taken when a complaint is made concerning conduct of a judge of the Corps. Such complaint may be made by any interested person, including parties, practitioners, the chief judge, administrative law judges, and agencies.

"(e) COMPOSITION OF THE BOARD.—(1) The Board shall consist of—

"(A) 2 judges from each division of the Corps, who shall be appointed by the Council; and

"(B) 16 attorneys who shall be appointed in accordance with the provisions of paragraph (2).

"(2) The Council shall request a list of candidates to be members of the Board from the American Bar Association. Such list may not include any individual who is an administrative law judge or former administrative law judge.

"(3) The chief judge and the division chief judges may not serve on the Board.

"(4) No individual may serve 2 successive terms on the Board.

"(5)(A) Except as provided under subparagraph (B), all terms on the Board shall be 2 years.

"(B) In making the original appointments to the Board, the Council shall designate one-half of the appointments made under paragraph (1)(A) and one-half of the appointments made under paragraph (1)(B), as a term of 1 year.

"(6)(A) Each member of the Board who is not an officer or employee of the Federal Government shall be compensated at a rate equal to the daily equivalent of the annual rate of basic pay prescribed for a position at the level of AL–3, rate C under section 5372 of this title for each day (including travel time) during which such member is engaged in the performance of the duties of the

Board. All members of the Board who are administrative law judges shall serve without compensation in addition to that received for their services as officers or employees of the United States.

"(B) The members of the Board shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance of services for the Board.

"(f) FILING AND REFERRAL OF COMPLAINT.—(1) A complaint concerning the official conduct of an administrative law judge shall be made in writing. The complaint shall be filed with the chief judge, or it may be originated by the chief judge on his own motion. The chief judge shall refer the complaint to a 5-member panel designated by the Council—

"(A) consisting of 3 administrative law judges appointed under subsection (e)(1)(A), none of whom may be serving in the same division as the administrative law judge who is the subject of the complaint; and

"(B) two members appointed under subsection (e)(1)(B), none of whom regularly practice before

the division to which the administrative law judge, who is the subject of the complaint is assigned.

"(2) Any individual chosen to serve on the panel who has a personal or financial conflict of interest involving the administrative law judge who is the subject of the complaint shall be disqualified by the Council from serving on the panel. The Council shall replace any disqualified individual or vacancy with another member of the Board who is eligible to serve on the panel.

"(g) CHIEF JUDGE ACTION.—(1) After expeditiously reviewing a complaint, the chief judge, by written order stating his reason, may—

"(A) dismiss the complaint, if the chief judge finds the complaint to be—

"(i) directly related to the merits of a decision or procedural ruling; or

"(ii) frivolous;

"(B) conclude the proceeding if the chief judge finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events; or

"(C) refer the complaint to the Complaint Resolution Board in accordance with subsection (f).

"(2) The chief judge shall transmit copies of the written order to the complainant and to the administrative law judge who is the subject of the complaint.

"(h) NOTICE OF THE COMPLAINT.—The administrative law judge and the complainant shall be given notice of receipt of the complaint and notice of referral of the complaint to the panel.

"(i) INQUIRY AND REPORT BY PANEL.—(1) The panel shall inquire into the complaint and have authority to conduct a full investigation of the complaint, including authority to hold hearings and issue subpoenas, examine witnesses, and receive evidence. All proceedings of the Complaint Resolution Board shall be confidential. The administrative law judge who is the subject of the complaint shall have the right to be represented by counsel and shall have an opportunity to appear before the panel. The complainant shall be afforded an opportunity to appear at the proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

"(2) In determining whether misconduct has occurred, the panel shall apply a preponderance of evidence standard of proof to its proceedings.

"(3)(A) Within 90 days after the referral of the complaint, the panel shall report to the Council on its findings

of fact and recommendations for appropriate disciplinary action, if any, that should be taken against the administrative law judge.

"(B) If the panel has not completed its inquiry within 90 days after receiving the complaint, the panel shall request an extension of time from the Council to complete its inquiry.

"(C) A copy of the report shall be provided concurrently to the Council, the administrative law judge who is the subject of the complaint, and the complainant. The Council shall retain all reports filed under this section and such reports shall be confidential, except that a recommendation for disciplinary action shall be made available to the public.

"(4) The recommendations of the panel shall include one of the following:

"(A) Dismissal of all or part of the complaint.

"(B) Direct informal reprimand.

"(C) Direct formal reprimand.

"(D) Suspension.

"(E) Automatic referral to the Merit Systems Protection Board on recommendations of removal.

"(5) The recommendations of the panel are binding on the Council, unless the administrative law judge appeals to the Merit Systems Protection Board.

"(j) DISCIPLINARY ACTION.—Except as provided in subsection (a)(2), the Council shall take appropriate disciplinary action against the administrative law judge based upon the report of the panel within 30 days after receiving the report of the panel. Such disciplinary action shall be enforced by the Council and shall be final unless the administrative law judge files an appeal with the Merit Systems Protection Board within 30 days after receiving notice of such disciplinary action.

"(k) RECOMMENDATION FOR RELIEF TO AGENCY, DEPARTMENT, OR COMMISSION.—Based upon a finding of judicial misconduct by an administrative law judge, the Council shall have authority to recommend to the head of an agency, department or commission that action may be taken to provide relief to aggrieved individuals due to the judicial misconduct by an administrative law judge.".

(b) APPOINTMENTS OF DIVISION CHIEF JUDGES.—It is the sense of the Congress that the President should appoint as division chief judges under section 599a(c) of title 5, United States Code (as added by subsection (a) of this section), individuals who have served as an administrative law judge for at least 5 years.

(c) ADMINISTRATIVE PROVISION.—Except as provided under subchapter VI of chapter 5 of title 5, United States Code, the chief administrative law judge and the

division chief judges appointed under such subchapter shall be deemed administrative law judges appointed under section 3105.

(d) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following:

"SUBCHAPTER VI—ADMINISTRATIVE LAW JUDGE CORPS

SEC. 4. AGENCY REVIEW STUDY AND REPORT.

(a) STUDY.—The chief administrative law judge of the Administrative Law Judge Corps of the United States shall conduct a study of the various types and levels of agency review to which decisions of administrative law judges are subject. A separate study shall be conducted for each division of the Corps. The studies shall include monitoring and evaluating data and shall be conducted in consultation with the division chief judges, the Chairman of the Administrative Conference of the United States, and the agencies that review the decisions of administrative law judges.

(b) REPORT.—(1) Not later than 2 years after the effective date of this Act, the Council shall report to the President and the Congress on the findings and recommendations resulting from the studies conducted under subsection (a).

(2) The report under paragraph (1) shall include recommendations, including recommendations for new legislation, for any reforms that may be appropriate to make review of administrative law judges' decisions more efficient and meaningful and to accord greater finality to such decisions, except that all decisions subject, before the effective date of this Act, to review pursuant to section 205(g) of the Social Security Act (42 U.S.C. 405(g)) shall continue to be subject to such review pursuant to such section.

(3) The report under paragraph (1) shall also include recommendations for using staff more efficiently to decrease backlogs, especially in the area of social security disability cases.

SEC. 5. TRANSITION AND SAVINGS PROVISIONS.

(a) TRANSFER OF FUNCTIONS.—There are transferred to the administrative law judges of the Administrative Law Judge Corps established by section 598 of title 5, United States Code (as added by section 3 of this Act), all functions authorized to be performed on the day before

the effective date of this Act by the administrative law judges appointed under section 3105 of such title before the effective date of this Act.

(b) USE OF AGENCY FACILITIES AND PERSONNEL.—With the consent of the agencies concerned, the Administrative Law Judge Corps of the United States may use the facilities and the services of officers, employees, and other personnel of agencies from which functions and duties are transferred to the Corps for so long as may be needed to facilitate the orderly transfer of those functions and duties under this Act.

(c) INCIDENTAL TRANSFERS.—The personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available or to be made available, in connection with the functions transferred by this Act, are, subject to section 1531 of title 31, United States Code, transferred to the Corps for appropriate allocation.

(d) PAY OF TRANSFERRED PERSONNEL.—The transfer of personnel pursuant to subsection (b) or (c) shall be without reduction in pay or classification for 5 years after such transfer.

(e) AUTHORITIES OF DIRECTOR OF OMB.—The Director of the Office of Management and Budget, at such

time or times as the Director shall provide, may make such determinations as may be necessary with regard to the functions transferred by this Act, and to make such additional incidental dispositions of personnel, assets, liabilities, grants, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds held, used, arising from, available to, or to be made available in connection with such functions, as may be necessary to carry out the provisions of this Act.

(f) CONTINUED EFFECTIVENESS OF PRIOR ACTIONS.—All orders, determinations, rules, regulations, permits, contracts, collective bargaining agreements, recognition of labor organizations, certificates, licenses, and privileges which have been issued, made, granted, or allowed to become effective in the exercise of any duties, powers, or functions which are transferred under this Act and are in effect at the time this Act becomes effective shall continue in effect according to their terms until modified, terminated, superseded, set aside, or repealed by the Administrative Law Judge Corps of the United States or a judge thereof in the exercise of authority vested in the Corps or its members by this Act, by a court of competent jurisdiction, or by operation of law.

(g) PENDING PROCEEDINGS.—(1) Except as provided in subsections (d)(5) and (e) of section 599b of title 5, United States Code, this Act shall not affect any proceeding before any department or agency or component thereof which is pending at the time this Act takes effect. Such a proceeding shall be continued before the Administrative Law Judge Corps of the United States or a judge thereof, or, to the extent the proceeding does not relate to functions so transferred, shall be continued before the agency in which it was pending on the effective date of this Act.

(2) No suit, action, or other proceeding commenced before the effective date of this Act shall abate by reason of the enactment of this Act.

(h) REPORTS BY OFFICE OF MANAGEMENT AND BUDGET.—The Director of the Office of Management and Budget shall monitor and report to the Congress—

(1) 60 days after the effective date of this Act, on the amount of all funds expended in fiscal year 1995 by each agency on the functions transferred under this Act and the amendments made by this Act;

(2) no later than October 1, 1995, on the amount of unexpended balances of appropriations, authorizations, allocations, and other funds trans-

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ferred by all agencies to the Administrative Law Judge Corps under this Act and the amendments made by this Act; and

(3) 1 year after the effective date of this Act, and each of the next 2 years thereafter on—

(A) whether the expenditure of each agency that transfers functions and duties under this Act and the amendments made by this Act are reduced by the amount of savings resulting from the transfer of such functions and duties; and

(B) the Government savings resulting from transfer of such functions to the Administrative Law Judge Corps and recommendations to the Congress on how to achieve additional savings.

SEC. 6. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated for each of fiscal years 1996, 1997, 1998, 1999, and 2000 to carry out the provisions of this Act and subchapter VI of title 5, United States Code (as added by section 3 of this Act) such amounts as may be necessary, not to exceed in any such fiscal year the total amount expended by all agencies in fiscal year 1995 in performing all functions transferred under this Act and the amendments made by this Act.

SEC. 7. TECHNICAL AND CONFORMING AMENDMENTS.

(a) TITLE 5, UNITED STATES CODE.—Title 5, United States Code, is amended as follows:

(1) Section 593(b) is amended—

(A) by redesignating paragraphs (4), (5), and (6) as paragraphs (5), (6), and (7), respectively, and

(B) by inserting the following after paragraph (3):

"(4) the chief administrative law judge of the Administrative Law Judge Corps of the United States;".

(2) Section 3105 is amended to read as follows:

"§ 3105. Appointment of administrative law judges

"Administrative law judges shall be appointed by the Council of the Administrative Law Judge Corps pursuant to sections 596 and 599c of this title.".

(3) Section 3344, and the item relating to section 3344 in the table of sections for chapter 33, are repealed.

(4) Subchapter III of chapter 75, and the items relating to subchapter III and section 7521 in the table of sections at the beginning of chapter 75, are repealed.

(5) Section 559 is amended—

(A) in the first sentence by striking "chapter 7" and all that follows through "7521" and inserting "subchapter VI of this chapter, chapter 7, and sections 1305, 3105, 4301(2)(E), and 5372"; and

(B) in the last sentence by striking "chapter 7" and all that follows through "7521" and inserting "subchapter VI of this chapter, chapter 7, section 1305, 3105, 4301(2)(E), or 5372".

(6) Section 1305 is amended—

(A) by striking "section 3105, 3344," and inserting "sections 3105,"; and

(B) by striking ", and for the purpose of section 7521 of this title, the Merit Systems Protection Board may".

(7) Section 5514(a)(2) is amended in the fourth sentence by striking ", except that" and all that follows through "administrative law judge".

(8) Section 7105 is amended—

(A) in subsection (d) by striking ", administrative law judges under section 3105 of this title,"; and

(B) in subsection (e)(2) by striking "under subsection (d) of this section" and inserting "under section 3105 of this title".

(9) Section 7132(a) is amended by striking "appointed by the Authority under section 3105 of this title" and inserting "appointed under section 3105 of this title who is conducting hearings under this chapter".

(10) Section 7502 is amended by striking "7521 or".

(11) Section 7512(E) is amended by striking "or 7521".

(b) OTHER PROVISIONS OF LAW.—

(1) Section 6(c) of the Commodity Exchange Act is amended—

(A) in the second sentence (7 U.S.C. 9)—

(i) by striking "Administrative Law Judge designated by the Commission" and inserting "administrative law judge of the Administrative Law Judge Corps"; and

(ii) by striking "Administrative Law Judge" and inserting "administrative law judge"; and

(B) by striking "Administrative Law Judge" each subsequent place it appears (7

U.S.C. 15) and inserting "administrative law judge of the Administrative Law Judge Corps".

(2) Section 12(b) of the Commodity Exchange Act (7 U.S.C. 16(b)) is amended by striking "Administrative Law Judges,".

(3) Section 274B(e)(2) of the Immigration and Nationality Act (8 U.S.C. 1324b(e)(2)) is amended by striking "are specially designated by the Attorney General as having" and inserting "have".

(4) Section 1416(a) of the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1715(a)) is amended—

(A) in the first sentence by inserting ", subject to section 599d of title 5, United States Code," after "who may";

(B) by striking the second sentence; and

(C) in the third sentence by striking "his administrative law judges to other administrative law judges or" and inserting "administrative law judges carrying out functions under this title".

(5) Section 488A(b) of the Higher Education Act of 1965 (20 U.S.C. 1095a(b)) is amended in the third sentence by striking ", except that" and all that follows through "administrative law judge".

(6) Section 509(1) of title 28, United States Code, is amended—

(A) by striking "subchapter II" and inserting "subchapters II and VI"; and

(B) by striking "employed by the Department of Justice".

(7) Section 12 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 661) is amended—

(A) in subsection (e)—

(i) by striking "administrative law judges and other"; and

(ii) by striking ": *Provided*" and all that follows through the end of the subsection and inserting a period;

(B) in subsection (j) in the first sentence by striking "A" and all that follows through "Commission," and inserting "An administrative law judge to whom is assigned any proceeding instituted before the Commission shall hear and make a determination upon the proceeding and any motion in connection with such proceeding,"; and

(C) by striking subsection (k).

(8) Section 502(e)(1) of the Rehabilitation Act of 1973 (29 U.S.C. 792(e)(1)) is amended by strik-

ing the second and third sentences and inserting the following: "Proceedings required to be conducted under this section shall be presided over by administrative law judges appointed under subchapter VI of chapter 5 of title 5, United States Code.".

(9) Section 166 of the Job Training Partnership Act (29 U.S.C. 1576(a)) is amended in the first sentence by striking "of the Department of Labor".

(10) Section 5(e) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 804(e)) is amended to read as follows:

"(e) Proceedings required to be conducted in accordance with the provisions of this Act shall be presided over by administrative law judges appointed under subchapter VI of chapter 5 of title 5, United States Code.".

(11) Section 113 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 823) is amended—

(A) in subsection (b)(2) by striking all that follows the second sentence;

(B) in subsection (d)(1) in the first sentence by striking "appointed by the Commission" and all that follows through "by the Commission," and inserting "to whom is assigned any proceeding instituted before the Commis-

sion shall hear and make a determination upon the proceeding and any motion in connection with the proceeding,"; and

(C) in subsection (e) in the first sentence by striking "its" each place it appears.

(12) Section 428(b) of the Black Lung Benefits Act (30 U.S.C. 938(b)) is amended by striking the seventh sentence.

(13) Section 321(c)(1) of title 31, United States Code, is amended—

(A) by striking "subchapter II" and inserting "subchapters II and VI"; and

(B) by striking "employed by the Secretary".

(14) Section 3801(a)(7)(A) of title 31, United States Code, is amended by striking "appointed in the authority" and all that follows through "such title;" and inserting "of the Administrative Law Judge Corps;".

(15) Section 19(d) of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 919(d)) is amended by amending the second sentence to read as follows: "Any such hearing shall be conducted by an administrative law judge qualified under subchapter VI of chapter 5 of that title.".

(16) Section 21(b)(5) of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 921(b)(5)) is amended by striking the first sentence.

(17) Section 7101(b)(2)(B) of title 38, United States Code, is amended by striking "7521" and inserting "599e".

(18) Section 8(b)(1) of the Contract Disputes Act of 1978 (41 U.S.C. 607(b)(1)) is amended in the first sentence by striking "hearing examiners appointed pursuant to section 3105 of title 5, United States Code" and inserting "administrative law judges appointed under section 3105 of title 5, United States Code (as in effect on the day before the effective date of the Reorganization of the Federal Administrative Judiciary Act)".

(19) Section 705(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–4(a)) is amended—

(A) by striking "administrative law judges,"; and

(B) by striking ": *Provided*" and all that follows through the end of the subsection and inserting a period.

(20) Section 808(e) of the Act of April 11, 1968 (42 U.S.C. 3608(e)), is amended—

(A) in the first sentence by inserting ", subject to section 599d of title 5, United States Code," after "The Secretary may";

(B) by striking the second sentence; and

(C) in the last sentence by striking "his hearing examiners to other hearing examiners or" and inserting "administrative law judges carrying out functions under this title".

(21) Section 806 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3787) is amended—

(A) in the first sentence by striking "appoint such hearing examiners" and all that follows through "United States Code," and inserting ", subject to section 599d of title 5, United States Code, request the use of such administrative law judges"; and

(B) in the second sentence by striking "hearing examiner or administrative law judge assigned to or employed thereby" and inserting "such administrative law judge".

(22) Section 401(e) of the Department of Energy Organization Act (42 U.S.C. 7171(e)) is amended by striking "appointment and employment of hearing examiners in accordance with the provi-

sions of title 5," and inserting "referral of cases to the Administrative Law Judge Corps in accordance with subchapter VI of chapter 5 of title 5,".

(23) Section 303(c)(3) of the Independent Safety Board Act of 1974 (49 U.S.C. App. 1902(c)(3)) is amended by striking ", attorneys, and administrative law judges" and inserting "and attorneys".

(24) Section 304(b)(1) of the Independent Safety Board Act of 1974 (49 U.S.C. App. 1903(b)(1)) is amended in the first sentence by striking "employed by or".

(c) REFERENCES IN OTHER LAWS.—Reference in any other Federal law to an administrative law judge or hearing examiner or to an administrative law judge, hearing examiner, or employee appointed under section 3105 of title 5, United States Code, shall be deemed to refer to an administrative law judge of the Administrative Law Judge Corps established by section 598 of title 5, United States Code.

SEC. 8. OPERATION OF THE CORPS.

Operation of the Corps shall commence on the date the first chief administrative law judge of the Corps takes office.

SEC. 9. CONTRACT DISPUTES ACT.

Nothing in this Act or the amendments made by this Act shall be deemed to affect any agency board established pursuant to the Contract Disputes Act (41 U.S.C. 601 and following), or any other person designated to resolve claims or disputes pursuant to such Act.

SEC. 10. PAYMENT BY CERTAIN AGENCIES FOR ADMINISTRATIVE LAW JUDGE SALARIES AND EXPENSES.

Any agency which before the effective date of this Act paid the salaries and expenses of administrative law judges from fees charged by such agency shall on and after the effective date of this Act pay from such fees to the chief judge of the Administrative Law Judge Corps, or the designee of the chief judge, an amount necessary to reimburse the salaries and expenses of the Corps for services provided by the Corps to such agency.

SEC. 11. EFFECTIVE DATE.

Except as otherwise provided, this Act and the amendments made by this Act shall take effect 120 days after the date of the enactment of this Act.

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Mr. GEKAS. The Chair notes the presence of a quorum with the arrival of the gentleman from Rhode Island, Mr. Reed.

We will commence the hearing by welcoming to the witness table the senior Senator from Alabama, Mr. Heflin, and we notice that two other Members of the Congress are also scheduled to be at this witness table. As they arrive, they will take their seats, but we will continue first with Senator Heflin and then Representative Bevill.

Senator Heflin, glad to see you here.

STATEMENT OF HON. HOWELL HEFLIN, A SENATOR IN CONGRESS FROM THE STATE OF ALABAMA

Mr. HEFLIN. Thank you, Mr. Chairman. I want to thank you and your subcommittee for giving us this opportunity to appear and testify in support of H.R. 1802, a bill which will reform and reorganize the Federal administrative judiciary within the executive branch of government. I'd like to ask that my full statement be made part of the record.

Mr. GEKAS. Without objection.

Mr. HEFLIN. And I'll basically summarize and maybe add some other points that I've thought of since the statement was prepared.

In the beginning of this Nation, the concept of separation of powers was a pervasive theory in the organization of the new democracy, the separation of the executive from the legislative and the judiciary courts from those two branches. As the founders of our democracy organized the judiciary, it was felt that there had to be independence of the judiciary from the legislative and executive branches of government. They came to the idea of lifetime appointments to give independence to the judiciary. In various cases the court has since that time made distinctions between article I and article III judges relative to that independence, to give them the right to be able to decide certain cases.

We developed the administrative law judge concept first through hearing officers, and it has evolved, and today we have a situation in which there are more administrative law judges than there are U.S. district court judges and court of appeals. There is no question that the decisions being made by administrative law judges affect the lives of probably more people than the other article III judges other than the Supreme Court and maybe the courts of appeals.

As this has evolved, there have been efforts to give independence to hearing officers and administrative law judges, but, nevertheless, there are so many subtle, indirect ways, and direct ways by which administrative agencies and departments attempt to control their judges. And, basically, this bill is a bill designed to prevent bureaucrats from controlling their judges. That's the basic issue, and it's there throughout.

I mention subtle ways. There are secretaries, parking spaces, all sorts of situations, and then there's the perception issue. I've had people who have been before administrative agencies, and after they finish a hearing, the agency prosecutor walks out with the administrative law judge and goes to lunch. That's just one way that there is a perception problem with the public.

There's no question that we've gone through stages where we've seen, and I think that the President during the conversation that I had with him recited some of this, and I mention it. He was tell-

ing me—I was sitting next to him at a dinner, and he was telling me about when he was on the National Governors Conference, and the issue of the Social Security came up, and he took a very strong stand against the way the Social Security Administration was being operated in what he said were quotas in regard to taking people off the Social Security rolls. I'm not getting into all of the merits and things else. And so I started talking to him about our legislation to reform the administrative law judge system and he liked this idea of independence for administrative law judges and asked me to write him. I gave him a letter and other information, and he turned it over to staff, and then the bureaucrats got hold to it. And when the bureaucrats got hold to it, they had one theme in mind: we don't want to lose control of our judges. The bureaucrats have been at the core of the opposition in 1993, relative to our reform efforts.

We were able to pass in the Senate this legislation, and it came over to the House, and the bureaucrats began to work and their lobbyists began to work, and before long they found this reason and that reason to argue against passage of our legislation in the House. This occurred in calendar year 1994 over a period of several months.

One of the big reasons is that we have to establish policy, and, therefore, the judges won't be able to follow agency policy. Well, to me, it's sort of like a judge charging a jury. The jury doesn't have free reign. They have to stay within the parameters of the judge's charge. In the same way, you can have, by procedures and mechanisms, a situation where the policy of the administrative agency or the department is declared in the equivalent of a charge, and a judge bound by it, and in the reviewing he's bound by it.

Expertise is another argument the bureaucrats always argue, but in this bill there are eight divisions, and there are similarities of expertise within the eight divisions. All ratesetting people are put in one division. There's continuing education. They argue, well, it takes expertise. Well, at the same time, they go to a district court judge and he or she is a generalist; he tries everything from a criminal case to an equal opportunity employment-type case and things else. So I don't think that argument is there.

But it comes back to the same thing: whether or not we have advanced in the administrative law judge approach to the extent there is a need for independence. And I think there is and I think the present system is grossly inadequate to guarantee that independence, and, therefore, it is essential that we move forward with this historic reform effort.

The administrative law judge independent corps is designed to give independence, still not to give them the freedom to change agency policy; that is a departmental function. A judge's decision can be reviewed if it is cut off line with agency policy. The review system is rapid relative to this, and it is something, in my judgment, that will add to the overall judiciary, add overall to administrative law, and to justice.

We are in a situation today where the administrative law judge, is a vital position. They are as much judges when it comes to facts and interpretation as a U.S. district court judge, and I think it's time that we give some independence to them. This bill that you

you have introduced will do that, but I'll tell you again, get ready for an onslaught. The bureaucrats are going to attack from all fronts. They don't want to lose control of their judges, and that's the whole issue that's involved here.

Thank you.

[The prepared statement of Mr. Heflin follows:]

PREPARED STATEMENT OF HON. HOWELL HEFLIN, A SENATOR IN CONGRESS FROM THE STATE OF ALABAMA

Mr. Chairman, I would like to thank you and your subcommittee for giving me the opportunity to appear and testify in support of H.R. 1802, a bill which will reform and reorganize the Federal administrative judiciary within the executive branch of government.

Your legislation is companion legislation to S. 468, which I introduced in the Senate this year with bipartisan support whose nine other cosponsors are Senators Specter, Ford, Thurmond, Bumpers, Brown, Simon, Shelby, Moseley-Braun, and Cohen. That is quite a political cross-section of the Senate and is proof that our reform efforts are truly non-ideological and bipartisan.

Our legislation passed the Senate unanimously in the Senate on 19 November 1993 and was sent to the House of Representatives where it was given a quiet death in this committee. It was killed by the bureaucrats who don't want to give up control of their judges. They will attempt to do the same thing this Congress.

Let me briefly outline to you the main features of our companion bills, not because you are unfamiliar with the details, but to emphasize why our reform efforts are important and why they must succeed this time.

A new Administrative Law Judge Corps, separate and apart from the executive branch agencies, will be established within the executive branch of the Federal government. The new corps will be under the control of a chief judge and a council, appointed by the President with the advice and consent of the Senate.

Each judge will be assigned to one of eight divisions within the corps based on agency specialization so as to retain and emphasize their specialty and expertise in a particular area of administrative law. Under this legislation judges will follow Federal statutes and agency regulations and will not make agency policy. Their prime role will be to independently adjudicate cases brought by citizens against the government under procedures established by the Administrative Procedure Act.

This adjudicatory function is critical to maintaining the integrity of the administrative law process. Under the current system, agencies control their judges, subtly or not so subtly. This is wrong and we must reform the system.

There are other added benefits to our reform efforts—and independent corps will promote less expensive and more efficient government on behalf of the American taxpayer. The Congressional Budget Office estimates that our legislation will save approximately $22 million a year, which is a substantial savings to the taxpayer. This truly is "reinventing government."

This legislation also contains important savings safeguards offered by Senator Hank Brown of Colorado and provisions dealing with the discipline and removal of judges who abuse their trust offered by Senator William Cohen of Maine.

In closing let me remind you that the Federal bureaucrats will fiercely oppose our reform efforts. I know first hand what they will do to maintain the status quo because they *are* the status quo. I believe the President wants to sign our bill. Hopefully, he will not be cut off at the knees with bureaucratic knives. We must prevail on behalf of the public who must retain absolute confidence in the integrity of a judge's ability to fairly and independently decide a case, free from agency influence.

Thank you for allowing me to be with you today.

Mr. GEKAS. Well, we're going to name you "Sergeant" to help us fend off the onslaught.

I must add that Senator Heflin brings another perspective to the witness table, that of a former judge. So that he is not simply talking from the political, bureaucratic or legislative standpoint, but he is actually speaking from personal experience.

We now switch to Representative Bevill.

We note the attendance and arrival of Representatives Frank and Kanjorski. And we will proceed accordingly.

Representative Bevill.

STATEMENT OF HON. TOM BEVILL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALABAMA

Mr. BEVILL. Mr. Chairman, thank you. I certainly appreciate the opportunity to appear here.

And before the judge gets out the door, if I may say, this gentleman is not only an outstanding attorney in Alabama for many years, but he's an outstanding Chief Justice of the Supreme Court of Alabama, and I could just go on and on talking about this gentleman, my senior citizen—senior Senator from Alabama.

[Laughter.]

Mr. BEVILL. I've called him that before.

Mr. GEKAS. He's a senior citizen, too.

[Laughter.]

Mr. HEFLIN. There's no denying it.

[Laughter.]

Mr. BEVILL. I've called him that before, and he reminds me that he is 3 months younger than I am.

[Laughter.]

Mr. BEVILL. But his greatest distinction is, Mr. Chairman and gentlemen of the committee, is that he went through law school, the University of Alabama, with me.

[Laughter.]

Mr. HEFLIN. He got me through.

[Laughter.]

Mr. GEKAS. We thank the Senator and——

Mr. BEVILL. Mr. Chairman, I don't know of much that I could add to what the Chief Justice has just stated, but you, and the members of this distinguished panel are very much aware of this situation, and I think it is one that is critical. I think it is one that this panel, I'm sure, is going to streamline and improve.

We see these Social Security cases each of us as Members of Congress, when we're in our office, we see all of these people coming in, the disability claims, for example, where they've been trying to get their disability for 3 to 5 years. I don't guess I ever have visited in any of my three offices in Alabama, congressional offices, that I don't see people that have paid their Social Security all these years and the coverage is there, and they can't get approved for disability Social Security, and the system is kind of bogged down when they have to wait 3 to 5 years to get disability Social Security. I'm using that as an example.

Actually, it defeats the purpose of the legislation, as you know, and it's just something that I think is one of the most critical things that affects more people probably today than any bill that we have before us right now. And these people need help. They've worked all their lives. They've become disabled, maybe for 12 months, whatever, and then they wind up on welfare, and it's not unusual for somebody to lose their home because their income has stopped and they can't get their disability claim even acted on, just plainly acted on. That tells us something.

So I do think that the bill that Senator Heflin has introduced several times is needed. I've been a cosponsor ever since it's been pending in the House and I just feel that this is something that we ought to give priority. And, of course, we're talking about H.R.

1802, and I have my statement filed, and I'd like for that to be considered as part of my testimony and——

Mr. GEKAS. Without objection, it will be entered into the record.

Mr. BEVILL. And I've gotten support for this from several of the administrative law judges that I have had the opportunity to talk with, and, of course, it's just as Judge Heflin referred to it. The input is supportive, especially from Judge Mel Cleveland of Birmingham, who is I think here with us today. I certainly have talked with him on many occasions.

So, actually, to get this legislation through, in my judgment, would produce more efficiency and it would streamline this administrative law judge system, making the ALJ corps an independent agency. And it just stands to reason that judges ought to have independence within certain limitations, as the former Chief Justice has just testified.

And, actually, the Congressional Budget Office has stated that this would save an estimated $22 million annually within 5 years. So we're talking about cutting the cost and improving the system, giving better service. After all, this is what each of you and I are here for, to try to give the best service possible to our people, and this would be one way of doing it.

So I just appreciate the consideration that you are going to be giving this legislation. And, you know, the appropriations for the next 5 years, through fiscal year 2000, are going to be held at the same funding level appropriated in fiscal year 1995. So this amounts to a 5-year freeze and adds up to a big savings. So I think we're on the right track on all of this, and I'd just like to be able to see this legislation become law to dispel the perception that the judge is just working for an agency. An independent ALJ corps will show there's no influence either directly or indirectly, on what decision judges make. It's obvious that it can be done, and it's obvious that it ought to be changed so that they will be independent.

So, with that, I'll just submit my prepared statement, and thank you for giving me this opportunity.

[The prepared statement of Mr. Bevill follows:]

PREPARED STATEMENT OF HON. TOM BEVILL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALABAMA

Mr. Chairman, I appreciate the opportunity to appear before this distinguished panel to express my support for H.R. 1802, the "Reorganization of the Federal Administrative Judiciary Act."

As you know, Chairman Gekas, I am an original co-sponsor of your bill. And, on the Senate side, this legislation was introduced by my good friend and colleague from Alabama, Senator Howell Heflin. We have worked on this issue for many years and we have received a great deal of input from Administrative Law Judge Mel Cleveland of Birmingham who is with us today.

H.R. 1802 would streamline the Federal Administrative Law Judge System making the ALJ corps an independent agency. This move will promote efficiency, reduce costs and increase productivity. In the long run, the American public will be better served.

The reorganization of the ALJ System will save an estimated $22 million annually within five years according to the Congressional Budget Office. We all know that every Federal program is under the budge microscope. Now is the time to go forward with this legislation which will make badly needed improvements to the ALJ System and save money for the taxpayer.

As you know, H.R. 1802 authorizes appropriations for the next five years, through fiscal year 2000, at the same funding level appropriated in fiscal year 1995.

This amounts to a five-year freeze and adds up to a big savings. I think we are getting a real bargain through this legislation and hopefully, more bang for the buck.

By creating an independent corps of administrative law judges, we are moving ALJs out from under layers of bureaucracy in their respective agencies. This will permit speedier, fairer justice for all concerned and will improve the public's perception of this legal process. The ALJs will be permitted to perform their duties expeditiously and to issue decisions more fairly. This should dispel the perception that the judge is just working for the agency.

I join wholeheartedly with my good friend Senator Heflin in supporting this legislation and ask that you favorably recommend this bill to the House for debate.

Mr. GEKAS. We thank the gentleman, and he's welcome to stay if he wants to entertain some of the questions that we might pose or he may leave, as he chooses.

Mr. BEVILL. If the panel has no objection, I'd like to just go on down to a full Appropriations Committee meeting I have.

Mr. GEKAS. We release you with the thanks of the subcommittee.

Mr. BEVILL. Thank you.

Mr. GEKAS. And now we turn to Representative Barney Frank, who over the last several terms has been an advocate, supporter, and mover of this legislation.

Barney.

STATEMENT OF HON. BARNEY FRANK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. FRANK. Thank you, Mr. Chairman. It's a pleasure to be back to the subcommittee where you and I once worked together. I think we still do hold the record for the quickest suspension bills getting through on the floor of the House.

And I'm always glad to testify, particularly with my colleagues, and especially with—I always like to share a panel with Senator Heflin to remind people, when he's here and I'm here and others, of the virtues of multilingualism in the United States.

[Laughter.]

Mr. FRANK. I think the bill makes a great deal of sense, and I have some concrete examples of why. Soon after I got here, there was a major dispute over disability, and in this case—and I don't want people to think that this is meant in any way to be an assault on ALJ's. As you know, the ALJ's themselves on the whole, in my experience, have liked this idea because it frees them from a kind of inherent pressure.

What we have where ALJ's are part of a particular department is the kind of thing where even the best people have difficulty running it. We're not talking here about corruption of individuals. We're not talking about people who personally are wrong. We're talking about a system which puts a whole lot of decent human beings in an unfortunate position.

But we had a case involving the Secretary of Health and Human Services where the ALJ's brought a lawsuit. They didn't win the lawsuit outright, but there was a settlement that I think helped with it. And at that point, the policy of HHS was—this was in the early eighties—if an administrative law judge found too many claimants to be eligible for disability, the administrative law judge had to go to what was kind of remedial judging class. They taught you how to be a better administrative law judge.

And I remember asking the people from HHS at a hearing, "Well, suppose a judge deviates from the norm." They set up a norm, a range that they thought was appropriate. And if you gave more claimants disability than the range would have predicted, you literally were sent to classes to learn how to be a better ALJ. So I asked, "Well, what if you gave—what if you deviated at the other end of the range? What if you found far fewer cases of disability than the norm predicted?" Oh, then nothing happened. Then it was to your—you didn't have to go to the extra classes.

Now, obviously, that was a pressure from a department which had a problem if the money was paid out; it didn't have a problem if it wasn't.

Then when my district was changed in 1992 and I became conversant with some of the problems of the fishing industry, we had a problem where, frankly, there was a particular administrative law judge who seemed to me to have too close of a relationship to the prosecutor, but it wasn't surprising. They lived together, in effect, professionally.

I went to a meeting where the prosecutor for the agency, the National Marine Fisheries Service, talked about the judge and himself in the first person, and it wasn't even the first person plural. He used the first person singular. I mean, we sat in a meeting in which he said, "Well, I sentenced him to this. I thought he had just been a repeat offender, so I gave him that fine. I gave him that suspension,"

I said, "Wait, you gave him? You're the prosecutor."

"Well, I mean the judge gave him."

And so I said I thought—again, they don't have to be bad people. When you work together all the time, these kinds of things can happen. And I said to the man's superiors, "Well, couldn't we get a rotation of judges?"

"Oh, no," because NMFS, the National Marine Fisheries Service, only had one. There was only one administrative law judge for the agency. Well, that's an inherent kind of conflict. Ultimately, a change was made, but, frankly, the way we have the system now, if a change gets made, it almost requires you to find fault with an individual. "Well, we'll have to remove him." That shouldn't be the case. The system should do it.

The notion that expertise requires that you have administrative law judges that deal only with this particular department is clearly undercut, as Judge Heflin said, by the fact that no other judges, or very few other judges, in our society do this. We do have a specialized panel now for intellectual property, but on the whole judges deal with everything. And certainly we, as Members of Congress, feel competent to vote on a wide range of issues. The notion that when you're talking about workers' compensation or eligibility for black lung or violation of the fishing laws, et cetera, that these are so arcane that people can't be expected to be able to master more than one very narrow area is a mistake. And I also think you run into a danger that if, in fact, you have this kind of specialization, the overall policy of the department can come to be too influential as opposed to the specific fact pattern. After all, judges are supposed to be adjudicating specific factual disputes within the context of the policy, but they're not simply policymakers. They are

adjudicators of these disputes, and I think the argument for what we're talking about is overwhelming. As Judge Heflin mentioned, the CBO has said this saves some money.

I have heard from an organization I respect a great deal, the National Treasury Employees Union. They're a little concerned about this, and I think that is entirely reasonable. When we are making any kind of a change, the rights of employees who work very hard for this Government, and especially in recent years for too little compensation, ought to be taken fully into account, and I think we would be committed to doing this in a way that would not disadvantage anyone in that regard.

But given the obligation I hope we will carry out to protect those legitimate concerns of employees, I cannot imagine—let me put it this way: if we were—inertia always has a certain force on its side, so you'll have a hard time changing things. But if we were designing this kind of an adjudicative system for the Federal Government from the start, I cannot imagine that we would decide to do it this way. I cannot imagine we would say, OK, well, we'll have judges that work for the Labor Department and judges that work for the Social Security Administration and judges that work for this agency. I think we would say, gee, let's have a pool, both in terms of fairness, no undue influence being exerted by the fact that they're part of that department and part of that department's budget, et cetera, and no problems of inefficiency, where you may have a backlog in one case and the judge is not as busy in other situations.

We've passed this, as you know, out of this subcommittee on several occasions. I don't think we ever quite made it to committee level, but I'm delighted now, Mr. Chairman, that you intend to move this forward, and I want to work with you to do it. As I said, I'll be eager to talk to people at the National Treasury Employees Union and others about this, but I think this makes a great deal of sense.

Mr. GEKAS. We thank the gentleman, and the history that he brings to the table here is going to be helpful to us.

Barney—you're correct, we did not get it to full committee, but then we learned that the Senate had passed it, and then we were going to conjoin over here when it reached us. However, I can't remember what happened next.

Mr. FRANK. Administrations, on a bipartisan basis, have been opposed to this, it's been my recollection, and I think the chairman had been listening to that. That was my general sense.

I first was introduced to this bill by the gentleman who is now the Secretary of Agriculture, who was chairman of this subcommittee in an earlier period. Secretary Glickman was, I think, one of the first that I worked with on it, and just got some high-level opposition at the administration level, and I think the chairman acceded to that at the time.

Mr. GEKAS. We thank the gentleman.

And now we turn to another individual who brings special merit to the witness table, Representative Kanjorski, my fellow Pennsylvanian, who, as he will relate, has personal experiences in this field to put into the record.

Paul.

STATEMENT OF HON. PAUL E. KANJORSKI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. KANJORSKI. Thank you very much, Mr. Chairman.

Mr. Chairman, I congratulate you for moving H.R. 1802 along, and I want to join you, and it's not my area of expertise in the Congress by a long shot. As you've indicated, I come here from personal experience of having been an administrative law judge in the Commonwealth of Pennsylvania for 9 years several years prior to my beginning my service in Congress. So I come with a little bit of background as to what the administrative law judge process is all about.

I think it is absolutely essential that we carry on this fight, and I could give you a little history of it. It goes back more than 10 years. It started with Aus Murphy when, upon my immediate election to Congress, I asked Congressman Murphy to come to Wilkes-Barre to have hearings because we had excess judges in one field that were sitting and had no backlog, no cases, and we had black lung cases and Social Security cases that were stacked up for years, and I couldn't understand why the one pool couldn't handle the other pool. But I learned for the first time there that at this certain level of the administrative law there's some requirement for unusual expertise; that, obviously, administrative law judges are not trained in the same law schools as Federal district court judges, that they can handle a wider range of subjects.

[Laughter.]

Mr. KANJORSKI. And I saw that happen. I agree with Mr. Frank that what really has happened here is, like topsy, this system grew, and no one really made an evaluation of the whole system to see whether or not it had an effect on the administration of justice.

I think the independence and impartiality of the administrative law judge system is as important, if not more important, than the Federal district court system, simply because more American citizens actually have their issues resolved by administrative law judges than the Federal district court and they're the first line, if you will, of the administration of justice in this country. It's very difficult to explain to an average American that someone that comes out of a department of government and is dependent on their career status and support systems from that agency or department of government, that there isn't perception or, in reality, some conflict that exists there.

I can't testify one way or another whether that exists in the Federal system, but I can tell you as a matter of fact in the State system we found it very difficult. When the administrative law judges were administered under the Department of Labor and Industry in Pennsylvania, there were statistics that were created and you were expected to fall within these norm realms, and if you didn't in your judgments, your abilities or your assignments were questioned. Although there was never a direct word, everyone knew that the statistics existed and they had a very damning effect on the administration of justice and the particular system.

I think we saw that weakness. Pennsylvania has made great strides to move its system ahead and create an impartiality and

change the lines of control. I think that is only reasonable in the Federal system.

I have met in my day hundreds of administrative law judges of the Federal system. I find them to be outstanding and extremely competent and able to handle a very wide range of expertise. There isn't any reason in the world why a Social Security administrative law judge can't go up and handle a fishing matter. There's nothing so expert in that fishing matter that he cannot brief himself on very quickly and handle.

We would have a corps that responds to the corps, not to the agency. We would not have a disparagement of powers, pay, and responsibilities. We would have flexibility to assign around the country and into the agencies that have the caseload that requires the assignment. Then, when that is done, they could be assigned somewhere else.

So that when you look at this, we, in this bill that you've put together—and I consider Austin Murphy's bill that I originally helped draft and joined him in the cosponsorship as a the grandfather to this legislation. I'm happy to have seen 10 years of progress here.

I think we have a chance to do something. Foremost, we'll establish independence and impartiality, something that is the hallmark of American justice. And, finally, as my good friend from Alabama pointed out, we'll actually save money in doing it. So the taxpayers get into a win/win situation: better justice at cheaper cost. Nothing could be better than that.

So I want to compliment the chairman and the ranking member for taking activity to put this up and look forward to working with you through the process.

[The prepared statement of Mr. Kanjorski follows:]

PREPARED STATEMENT OF HON. PAUL E. KANJORSKI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. Chairman, members of the Subcommittee, I am honored to join my friend and colleague from Pennsylvania, Chairman Gekas, as an original cosponsor of H.R. 1802, legislation to create an independent corps of Administrative Law Judges (ALJs). I appreciate your holding a hearing on this bill which, if enacted, could save the federal government tens of millions of dollars while at the same time enhancing the independence and impartiality of our administrative law system, and improving the administration of justice.

I am here today not only as the Representative of 560,000 people who rely on the decisions of ALJs to bring them justice, but also as a lawyer who has practiced before administrative tribunals and as a former Referee in Pennsylvania's workers' compensation system. I know from first hand experience the conflicts and problems which confront ALJs, litigants and their representatives every day.

As you know, the effort to centralize and bring coherence to the ALJ system is not new. Ten years ago, in 1985, our former colleague, Austin Murphy, held a hearing at my request in Wilkes-Barre to look into the vast backlogs of Black Lung claims. We found that at the same time Department of Labor ALJs were overburdened, ALJs in other agencies had little to do. In response to this finding we introduced a bill which I view as a grandfather of H.R. 1802. Together with Austin Murphy, and with the support of colleagues such as Congressman Frank and yourself, we continued to sponsor legislation very similar to H.R. 1802 in the 99th and succeeding Congresses. I applaud you Mr. Chairman, for continuing in the forefront of an effort which has stretched out for over a decade.

Mr. Chairman, it is time for Congress to bring organization and efficiency to a system which has been allowed to evolve on an ad-hoc basis over the years. As individual agencies have established their own administrative law system, wide disparities have emerged among the powers, pay, and responsibilities of ALJs and the procedures used in their courtrooms. The current system of employing ALJs within

agencies is contrary to our traditional principles of judicial independence and impartiality. No matter how fair-minded individual ALJs are, the perception remains that when the political party in power picks the heads of departments, agencies and commissions, the bosses of the ALJs, that the agencies will tend to abuse those powers and try to influence decisions by ALJs.

Rather than this uneven and unfair administrative structure, we need a centralized corps through which judges and other resources can be deployed when and where they are needed. This is the essence of modern management techniques. Every major business in America has learned in recent years how to more flexibly deploy its work force to maximize scarce resources. The federal government needs to catch up with the private sector in this area.

Our current bill, H.R. 1802, has benefited from the decade of study and comment and represents an improvement over previous ALJ Corps bills. This bill contains an administrative structure which will deploy ALJs efficiently and fairly. Furthermore, the uniform set of procedures the new Corps will utilize will bring needed consistency into the system. CBO has scored the bill as a savings for the American taxpayers. This bill works in the best spirit of reinventing government by making the federal system of administrative law work better for less money. Thank you for inviting me to testify at this hearing today. I will be happy to answer any questions you may have.

Mr. GEKAS. We thank the gentleman, and we will call upon him when the time comes to assist us on the floor, so that the statements that he made today can be replicated and embellished for the record on final passage, as we envision it.

Mr. KANJORSKI. I look forward to it, Mr. Chairman.

Mr. GEKAS. We thank the gentleman.

Mr. KANJORSKI. Thank you, Mr. Chairman.

Mr. GEKAS. The Chair congratulates itself on bringing to the witness table the colleagues in the Congress who have established an excellent backdrop for the pursuit of this legislation. We will now entertain the second panel, beginning with the Honorable John Hardwicke, the Chief Administrative Law Judge, Office of Hearings and Appeals, from the State of Maryland.

We welcome you to the witness table, and we know that you will add importantly to the testimony that has been given by our colleagues from the Congress.

It must be noted that our witness has come from North Carolina via Washington, DC, to Maryland and has vast experience that will accord him the level of an expert for our purposes, and I mean that sincerely. And as the audience listens to the testimony of our witness, Mr. Hardwicke, they will understand what I mean.

Joining him is John T. Miller, on behalf of the American Bar Association, and Prof. Victor Rosenblum, professor of law and political science, Northwestern University School of Law.

So we will begin with the testimony of Judge Hardwicke.

STATEMENT OF HON. JOHN W. HARDWICKE, CHIEF ADMINISTRATIVE LAW JUDGE, OFFICE OF ADMINISTRATIVE HEARINGS, STATE OF MARYLAND

Judge HARDWICKE. Mr. Chairman, I thank you for that introduction, and members of the committee.

I have prepared several pages of testimony which I would appreciate being annexed and also being introduced into the minutes of this committee.

Mr. GEKAS. Without objection, the statement will be entered into the record.

Judge HARDWICKE. Mr. Chairman and members of the committee, I bring a different perspective to these hearings because in

Maryland, which is not one of our largest States but it is not one of our smallest, has about 1/50th of the population of the country, and it's a fairly representative State in terms of what it does in serving citizens.

There are 22 States that have now adopted the central corps system for administrative justice. Maryland was about the 12th or the 13th.

More than 60 years ago, Justice Brandeis observed that it is, and I quote him, "one of the happy incidents of the Federal system that a single courageous State may, if its citizens choose, serve as a laboratory." Mr. Justice Brandeis' remarks are particularly appropriate. Maryland and a number of other States serve as a model for what you, Mr. Chairman, have introduced in the form of this legislation.

In Maryland, we hear more than 50,000 administrative cases per annum. I have working under my general supervision, as the Chief Administrative Law Judge of the State of Maryland, of its Office of Administrative Hearings, approximately 64 administrative law judges.

When we were first created, every single executive agency of the State of Maryland sought to defeat the legislation as it pended in the Maryland Legislature. When it passed, almost every single agency sought to get the Governor to veto it. And when the Governor did not do that, most agencies sought an exemption.

In 1994, the Governor had one opportunity, one last opportunity, to exempt agencies. Mr. Chairman, not one agency sought an exemption. That was the fifth year of our existence. And the point of this testimony is that, having tried it and having worked with the agencies and having had our corps of judges to work with the agencies in putting their policies and their expertise on the table, in the context of an actual hearing, they liked it.

So that the objections that you hear on a theoretical basis, when the system is actually tried, somehow they simply disappear. And let me talk about the objections I've heard them. I heard them in Maryland when we were talking about creating the system, and I have heard them since, but they have gradually diminished.

Agency expertise is one that you hear all the time. The agency says, "Look, we're experts in this. The judge has to be our employee; otherwise, the expertise that we are mandated to give to the public is lost." Mr. Chairman, that is not true.

The agency expertise can be put on the table in the course of the hearing through its witnesses. The judge can hear that expertise. The citizen involved with the agency can put on his expert witness or their expert witness, and the judge can weigh the various expertness exactly the way a Federal district judge does or other judges.

Also, Mr. Chairman, I must say in this modern day when we're concerned about the size and the power of government, expertise can frequently be a hiding place for governmental power which is not diagnosed or understood very well, and when you get into a system where the judge and the prosecutors and all are speaking the language of expertise, justice can be diminished substantially. So treating expertise as something that is sacrosanct is not going to serve the public well.

Cost: you'll hear it said that this is going to be a costly system, that it will be a gigantic bureaucracy, a whole new corps of judges that did not exist before. Not so, Mr. Chairman. We—before Maryland's OAH came into being, there were 91 hearing examiners assigned this responsibility. Their budget was very, very substantial on a per-case basis, much greater than a per-case basis now that we have a professional corps. We do this work with approximately 64 administrative law judges. Consequently, there are very substantial savings that are realized more automatically and conceptually and in practice with a central corps system.

Agency policy: agencies are correct to worry about their policy. They're in the administrative, they're in the executive part of the Government. Their policies should be paramount. But, Mr. Chairman, those policies also are a part of the law of the case. They can be put on in the course of the presentation of the case.

So, in summary, Mr. Chairman, when we deal with the actual practice of a central corps, in the 5 and going on 6 years that we've done this in Maryland, I must say it has proven a success. There is no substantial or significant force or voice in my State which is opposed to our continued existence. We hope to be around, Mr. Chairman, at least 100 years.

Thank you.

[The prepared statement of Judge Hardwicke follows:]

PREPARED STATEMENT OF HON. JOHN H. HARDWICKE, CHIEF ADMINISTRATIVE LAW JUDGE, OFFICE OF ADMINISTRATIVE HEARINGS, STATE OF MARYLAND

I am John W. Hardwicke, Chief Administrative Law Judge of Maryland's Office of Administrative Hearings ("OAH"); I have been Chief Judge since the creation of the OAH, January 1, 1990.

My background prior to this responsibility was that of a corporate lawyer in Baltimore with a regulatory practice involving federal agencies such as the Federal Energy Regulatory Commission in Washington and Maryland's Public Service Commission in Baltimore.

Although I have been a Marylander for more than forty years, am a North Carolinian by birth. More details of my background are provided in the attached Curriculum Vitae. (Exhibit No. 1 is retained in the subcommittee files.)

I. FORCES LEADING TO CHANGE

An executive agency, whether federal or state, is a microcosm of government—it performs executive, legislative and judicial functions. Recent critics of the growth of government consider that agency assumption of the tripartite responsibilities of government is a major source of abuse and excessive governmental influence.[1] One giant step toward correction of this abuse is separation of the judicial function from the agency by the creation of an independent administrative law judge corps.

In Maryland, because of a perception of partiality and unfairness, and because of inefficiencies and external influences over administrative hearing procedures, Governor William Donald Schaefer appointed a Task Force to study administrative judicial due process in 1988.

This Task Force concluded that the system was indeed fraught with problems, with the appearance of unfairness, lack of professionalism, lack of a sense of ethics and was unduly burdensome and expensive.

II. THE TRADITIONAL SYSTEM

The traditional system employed approximately 91 hearing examiners, including those who worked part-time, at a cost exceeding $7 million, although the precise cost was not segregated and is not known. Hearing examiners were employees with-

[1] See, for example, Gary Lawson, "The Rise and Rise of the Administrative State," *107 HAV. L. REV. 6 1231, 1249* (April 1994).

in the various agencies—some agencies employed as many as twenty-five examiners, some as few as one or two.

III. The Present: Maryland's Corps System

As a result of the study and its recommendations, the legislature created an Administrative Law Judge Corps ("ALJC") embracing the hearing/adjudicatory function of all state agencies except, primarily, the Public Service Commission and the Workers' Compensation Commission. This ALJC employs a Chief Administrative Law Judge ("Chief Judge") and 63 administrative law judges ("ALJs") who hear more than 50,000 cases per annum, and who administer flexible due process in a large variety of situations involving over 200 state programs. These ALJs are cross-trained and most are capable of hearing any kind of case within the aegis of OAH's responsibility.

Maryland's corps system was originally zero-budget based, that is, its original budget was derived by the aggregation of the various agencies' hearing budgets. The first year budget (fiscal year 91) was approximately $7 million; the fiscal year 1996 budget is approximately $8.5 million. The dollar growth is attributable to increases in caseload and responsibilities.

IV. Original Statute and Implementation

The statute creating Maryland's ALJC was passed by the legislature in the spring of 1989. The Chief Judge interviewed the hearing examiners among the agencies in November and December 1989. The statute was flexibly drawn giving the Chief Judge wide discretion in the employment and dismissal of ALJs.

The statute called for the creation of a Governor's nine person coordinating Commission chosen from executive agencies, the Attorney General's office, the state bar association, and the public at-large. This Commission operates loosely as a board of directors and sounding board for the public and the agencies.

V. Agency Policy and Expertise

Maryland's Office of Administrative Hearings does not attempt to make or influence executive agency policies. Its sole function is to provide due process within the executive setting. Its only policy function lies in the adoption of Rules of Procedure designed to expedite and make efficient the opportunity for hearings for citizens affected by agency actions.

Agency policy, properly enunciated, is part of the law applicable to the case and is presented by the agency within the framework of the hearing. Pro se presentations by citizen litigants are encouraged and assisted. Agency expertise is presented, on the record, at the hearing by agency witnesses. Citizen witnesses counter such expertise by their own testimony or by experts. The ALJ incorporates this expertise into the decision, as appropriate.

VI. Cross-Training

Originally, most of the ALJs were hearing officers within the agencies. As these original ALJs have retired they have been replaced with well-trained, more experienced attorneys.

Cross-training consisted of ALJs "going to school" to classes provided by colleague ALJs from the respective agencies. These classes consisted of studies of statutes and agency regulatory law, agency policies and procedures, understanding of programs, and agency objectives. By the end of the first two years, all ALJs were required to be proficient in hearings for at least six agencies and for all of the programs for those agencies. By the third year of the ALJC, most ALJs could hold hearings for all agencies and all programs.

VII. Savings and Efficiencies

The savings are obvious and easy to identify. The organizational existence of a professional ALJC employing a corps of cross-trained, well qualified judges can be used more efficiently and precisely across an array of hearing schedules and programs. Such a corps can effectuate settlements, and eliminate unnecessary postponements. It can employ computer technology. It can program a large cadre of judges to a myriad of hearings in numerous locations and settings. In addition, and as a fall-out benefit, agencies are more efficient and fair minded in their dealings with citizens whose hearings are to be held outside of the agency. Agency executives are more sensitive in the performance of their duties; agency presenters are better prepared for their due process hearing.

Attached to this presentation is an exhibit detailing costs associated with Maryland's ALJC. (Exhibit No. 2 is retained in the subcommittee files.)

VIII. CONCLUSION

In these times of diminished government, achievement of savings and efficiencies through the creation of an ALJC is plainly demonstrable. The Federal Government employs fewer than 300 ALJs other than the approximately 1,000 employed by the Social Security Administration. Modern sophisticated computer and information technology make possible the assimilation of vast quantities of data and the systemization of multiple judicial procedures and complex dockets. The very size of the federal administrative machinery is a challenge, not an obstacle.

More than sixty years ago Justice Brandeis' observed that it is "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory."[2] The transformation from the traditional in-house hearing system to the corps system is now accelerating among the states—most recently in South Carolina, Georgia and Texas—making a total of approximately twenty-two corps states. (Exhibit No. 3 is retained in the subcommittee files.)

The federal government may now safely follow the leadership of the states in the adoption of this proven re-origination of its administrative judiciary.[3] [4]

Mr. GEKAS. We thank the gentleman, and we'll ask him to remain at the witness table, so that we may pose some questions following the other testimony.

We'll turn to the American Bar Association's representative, Mr. Miller.

STATEMENT OF JOHN T. MILLER, JR., ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. MILLER. Thank you, Chairman Gekas.

I'd like to present a practitioner's point of view. I've practiced for 40 years in the area of administrative law.

I want to express the appreciation of the American Bar Association for the opportunity to appear in support of H.R. 1802. I ask that my prepared statement be copied in the record.

Mr. GEKAS. Without objection, it will be received for the record.

Mr. MILLER. An interesting thing about this bill is it's the product of over a decade of debate, consideration, amendment, and expert experienced review. In 1983, when I first testified on the Senate side on this bill, I could not support the text as it then read. I believed that the expertise that the ALJ's often had ought to be used at least for a period of some years, if possible, in a particular department or agency's area of operation. The bill did not do that. In its present form, I think it does respect the expertise, so that it's put to work where it's needed. Instead of having 29 departments and agencies individually employing judges, they will be in one corps and they'll be moved along.

Let me just focus on what is wrong with the present system that the bill remedies. Others have spoken about its virtues.

First, I think it offers the judges a better chance of a career service. We tend to forget, for example, that the Interstate Commerce Commission once employed 125 hearing examiners. That's the title

[2] Concurring in *New State Ice Co.* v. *Liebman*, 285 U.S. 262, 311 (1932).

[3] A word of caution: The statute should not be drawn so tightly with such specific detail as to micro manage the Corps. Permit flexibility, and above all else, choose a knowledgeable and practical Chief Judge who will administer the administrative judicial process with understanding and common sense.

[4] For an exhaustive, detailed account of Maryland's OAH see my article, "The Central Hearing Agency: Theory and Implementation in Maryland", 14 *Journal of the National Association of Administrative Law Judges* (Spring 1994).

the ALJ used to have. Today there are none. The judges were fired. There is a more elegant word than that. "RIF'd" I think is the technical word. Then there was a scramble to find them jobs elsewhere.

When they're in a corps, the ALJ's can be moved from the areas where Congress has decided ALJ's are no longer needed and moved to work in areas where Congress has decided they are needed. The bill does offer a better chance of a career. I think on that score it will attract better candidates who wish to become administrative law judges.

Second is the area of continuing legal education. A lot is said about expertise. But there is very little done nowadays to provide continuing education for the administrative law judges. The bill makes it a requirement that the council in cooperation with the departments and agencies for whom the judges will be hearing cases, help ALJ's acquire the expertise deemed necessary and in time to serve better.

It is a third deficiency in the present system that there is simply not an effective disciplinary and removal system. It doesn't exist. This bill for the first time will create one. There will be a complaint resolution board made up of judges and lawyers, so there will be an outside perception of how this works.

The complaint system will protect the independence of the judge. It will be handled on a confidential basis, although the complainant will be informed as to how the case proceeds. There will be the power to remove for mental and physical disability, and to discipline in various ways up to removal for misconduct or neglect of duty. The actual removal can't be done by the council. It has to be done by the Merit Systems Protection Board. So there is something being created that will make this a better system. It will improve the accountability of the judges who do not perform their functions.

On the other hand, I think that the independence of the judges will be enhanced, as Senator Heflin has pointed out to you. The Office of Personnel Management, which now operates a screening process for candidates, under this bill would continue to perform that function. We believe that that's a vital part of its duty. It screens the candidates, and puts them on a register of eligibles from which the appointments are made. This has led to a better quality of candidate. It has led to a nonpolitical system of appointments. We believe that OPM's role should continue under this bill. If the function of the OPM in this regard has to be done on a reimbursable basis, we would hope that the budget of the corps would contain the funds necessary to reimburse in that manner.

The agencies will lose none of their present power over rulemaking or policymaking. The bill so states. And the agencies and departments will retain their power to review the decisions of the administrative law judges just as they do today. They can reverse. They can amend. They can affirm. There's no denigration of that power.

Thank you very much.

[The prepared statement of Mr. Miller follows:]

PREPARED STATEMENT OF JOHN T. MILLER, JR., ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee, my name is John T. Miller Jr. I appreciate this opportunity to appear before you and to testify on behalf of the American Bar Association in support of H.R. 1802.

I am a lawyer with over forty years of practical experience in the field of federal administrative law. My office is at 1001 Connecticut Avenue, N.W., Washington, D.C. 20036. I am a former chairman of the Section of Administrative Law and Regulatory Practice of the American Bar Association, and have served in the Association's House of Delegates. I have been an adjunct professor At Georgetown University Law Center for thirty-five years.

My experience with the recruitment and appointment of administrative law judges goes back to the 1960's when, for several ears, I acted as liaison between the American Bar Association and the Civil Service Commission in connection with the Commission's program for recruiting and examining candidates for appointment as Hearing Examiners, now called Administrative Law Judges (ALJs), under the Administrative Procedure ACT (APA). As a member of panels appointed to the Commission, I interviewed a large number of lawyers seeking to become ALJs. This experience prompted me to write several articles evaluating the Commission's programs and urging reforms. For ten years I lectured at seminars given for federal and state administrative law judges at the National Judicial College in Reno, Nevada.

I have previously testified before committees of the House of Representatives and the United States Senate on proposed legislation affecting the role of the ALJs. Lists of relevant articles and of previous appearances before Congressional committees on ALJ matters may be found in an Appendix to this statement.

Since at least 1933, the American Bar Association has considered at various times the proper role of administrative law judges as hearing officers in the quasi-judicial processes of federal departments and agencies.[1] Since 1983, various elements of the Association have had under active consideration the proposal to create a unified corps of administrative law judges at the federal level. Consideration of earlier versions of H.R. 1802 have been undertaken by the Judicial Administration Division, Administrative Law Section, Litigation Section, General Practice Section, and the Tort and Insurance Practice Section (TIPS).

At the 1988 Annual Meeting of the Association, a joint recommendation to the House of Delegates in support of a unified corps was sponsored by the Judicial Administration Division and the Sections of General Practice, Litigation, and TIPS. The recommendation of these sections was adopted by an overwhelming vote of our policy-making House of Delegates.

The resolution affirms that the Association supports in principle the enactment of legislation to enhance the judicial independence and efficiency of federal administrative law judges through the establishment of a government-wide corps of such judges. In addition, such legislation should include appropriate provisions to:

(1) utilize, develop and enhance administrative law judges' expertise in specialized fields;

(2) retain agency review of administrative law judges' decisions;

(3) provide that administrative law judges adhere to the duly promulgated policies, procedures, and priorities of the agencies involved;

(4) provide a fair and effective method of removing, or disciplining an administrative law judge for misconduct or neglect of duty;

(5) provide for the improvement of administrative law judges' performance pursuant to the American Bar Association's Guidelines for the Evaluation of Judicial Performance;

(6) provide salaries for administrative law judges, salaries that are adequate and appropriate to their functions and responsibilities; and

(7) lodge the Administrative Law Judges Corps within the Executive Branch.

The Association recognizes the increasingly large and critical role played by administrative law judges in the administrative process. Even excluding the extremely large volume of cases decided by the Social Security Administration, the numbers of cases decided by all other administrative law judges runs into the thousands. Moreover, the variety of controversies subject to the administrative hearing process includes practically every conceivable subject governed by a federal agency or department. Cases presided over by administrative law judges include:

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[1] *Administrative Law Judges: The Corps Issue*, a monograph by Judge Earl Thomas, American Bar Association, 1987, pp. 17–25.

. . . licensure and route certification of transportation by air, rail, motor vehicle or ship; licensure of radio and television broadcasting; establishment of rates of gas, electrical, communication and transportation services; compliance with federal standards relating to interstate trade, labor-management relations, advertising communications, consumer products, food and drugs, corporate merger and antitrust; regulation of health and safety in mining, transportation and industry; regulation of trading in securities, commodities and futures; adjudication of claims relating to Social Security benefits, workers' compensation, international trade and mining, and many other matters.[2]

Moreover, Congress continues to enact legislation which requires or provides for hearings before administrative law judges. Such proceedings arise under the Immigration Reform and Control Act of 1986, the Anti Housing Discrimination Act of 1988, the Polygraph Act of 1988, the Program Fraud Civil Remedies Act, and various kinds of whistle blower legislation. The breath of legislation that provides for hearings before an administrative law judge is staggering. At the Department of Labor, for example, cases can arise under approximately 80 different statutes or regulations.

The American Bar Association believes that it is essential to protect the integrity and independence of the administrative law judge in the administrative process in view of the important proceedings over which they must preside. These judges must be impartial fact-finders who decide cases based upon law. At the same time, they must follow the legitimate policy determinations made by the agency or department whose cases they decide. For these and other reasons, the independence of these judges is a vital concern.

H.R. 1802 would separate all administrative law judges from their present agency or department into an independent corps of judges in the Executive Branch. The Corps would be governed by a chief judge and would be divided into eight specialized divisions, with each division supervised by a division chief law judge. The chief judge and division chief judges would be appointed by the President with the advice and consent of the United States Senate.

The chief and division chief judges would form a council that would be the policy-making body of the Corps. The Council would have the authority to assign judges to divisions, appoint persons as administrative law judges, prescribe rules of practice and procedure for the Corps, issue appropriate rules and regulations for the efficient conduct of the Corps, and in general be responsible for the Corps' daily operations.

The bill contains explicit protections for the judges of the Corps. Appointments of administrative law judges would continue to be made from a register of qualified candidates maintained by the Office of Personnel Management. A judge may not be involuntarily reassigned to a new permanent duty station if it is beyond the commuting area of his or her present duty station. Judges would continue to hear and adjudicate the same types of cases in which they have a developed expertise, and over which they presently preside. Further, judges would continue to be assigned cases within their division on a rotating basis, so far as practicable. In addition, administrative law judges would be authorized to act as special masters pursuant to Federal Rule of Civil Procedure 53(a).

H.R. 1802 also contains provisions for the removal and discipline of administrative law judges. The bill contains specific protections of judges, and provides that they may not be removed, suspended, reprimanded, or disciplined except for misconduct, neglect of duty or for physical or mental disability. Further, the bill provides for the Council to issue rules of judicial conduct and provides for a Complaints Resolution Board, composed of judges and experienced attorneys, to investigate any complaint concerning the official conduct of a judge.

Finally, the bill contains provisions for the smooth transition of authority over judges from the federal agencies to the Corps. An important provision of this transition is that within two years of enactment, the bill calls for a study and the submission of recommendations which would further streamline the administrative decisionmaking process.

The ABA wishes to commend you, Mr. Chairman, for your support of the Corps proposal. The ABA strongly concurs in the need for your legislation. Under the provisions of the bill, all administrative law judges would become part of an independent Corps of judges lodged within the Executive Branch. By dividing the Corps into eight specialized areas, the expertise of judges will be preserved and enhanced. In the divisions, judges will hear cases arising from the same area of law instead of cases solely from one agency. The judges' experience within the divisions will be

[2] Lubbers, Federal Administrative Law Judges: A Focus on Our Invisible Judiciary, 33 ADMIN. L. REV. 109 (1981).

broadened and there will be more variety within their specialized area, but their expertise will not be squandered.

In addition, it is important to note that H.R.1802 provides that the Corps Council must establish, after consultation with the agency, programs to assure that judges assigned to hear cases of an agency have the necessary training in the specialized field of law of that agency. This is an important provision and a great improvement over the present situation in which there are very few training programs in specialized areas for judges. Often a newly appointed judge's training is limited to on-the-job training or self-education.

The Association calls for the federal agencies to retain review of judges' decisions and provides that judges should adhere to the duly promulgated policies, procedures, and priorities of the agencies involved. H.R. 1802 specifically provides that the bill shall effect no change in any agency's rulemaking, policymaking, or reviewing authority over a judge's decision. However, Section 599d provides that any kind of proceeding held before administrative law judges before the Corps' creation shall continue to be referred to the Corps. Section 599d provides further that judges of the corps shall hear and decide every case subject to sections 553, 554 or 556 of the Administrative Procedure Act or every case in which hearings are required by law to be heard in accordance with sections 553, 554 or 556 of the APA. Thus, judges would continue to hear all proceedings and adjudications over which the APA presently gives them jurisdiction.

H.R. 1802 would not affect a federal agency's ability or jurisdiction to review a judge's decision in the same manner in which it now reviews an initial or recommended decision. Nor, as noted above, would it affect the present requirement that judges adhere to the policy of an agency which has been promulgated in rules, regulations, procedures, or case decisions. The only change in the processing of a case is that the presiding judge is not an employee of the agency instituting the proceeding or reviewing the judge's decision.

The Association further recommends that there should be a fair method for disciplining or removing judges for misconduct or neglect of duty. Section 599e directly addresses this question. In addition to being "removed, suspended, reprimanded, or disciplined" for misconduct or neglect of duty, judges may also be removed for physical or mental disability. Further, the bill provides that the Corps Council shall create a Complaints Resolution Board, composed of judges and experienced attorneys, to consider and recommend appropriate action to be taken when a complaint is made against the official conduct of a judge. If the Council decides to take action against a judge, the Council must file a notice of adverse action against the particular judge with the Merit Systems Protection Board. The procedures for disciplining judges balance the need to protect the judge's independence with the need for proper administrative control.[3]

Mr. Chairman, H.R. 1802 meets all of the conditions that we believe that a corps of administrative law judges should anticipate. Now, I would like to review what I believe are the benefits of the creation of a government-wide Corps.

The creation of a Corps would assure the public, the companies, and the counsel that appear before administrative law judges that hearings before such judges are fair. Often the impartiality of a judge who is also an agency employee is questioned by those who must appear before that judge in an agency proceeding. The judge, as well as his or her support staff, is an employee of the agency that initiated the proceeding or the agency from which the person or company is seeking a benefit or license. At the very least, the appearance of a possible lack of impartiality exists.

The creation of a Corps would clarify the judge's independent status not only with the public, but also with the federal agency and its staff. Some agencies, such as the Social Security Administration, have attempted to influence a judge's decision or question why the judge is not a "team player." Not all agencies have engaged in such conduct, but it has occurred often enough to raise serious concerns. Just as important, the possibility of such interference exists at any agency. The creation of a Corps would end such conduct and virtually eliminate any possibility that such conduct would occur in the future. The creation of a Corps would bring about a more efficient use of administrative law judges. The present system divides the management of judges and cases among 29 separate departments and agencies. There is simply no effective way to assign judges in accordance with varying peaks and valleys of individual agency caseloads. As a result, a highly trained expert resource is

[3]The Association also recommends the establishment of procedures for the improvement of a judge's performance in accordance with ABA Guidelines for the Evaluation of Judicial Performance. These guidelines, adopted by the ABA in 1985, cover all judges, state and federal, not just administrative law judges.

not being efficiently utilized to the best advantage to achieve prompt disposition of administrative proceedings.

The unified Corps will be able to adjust the assignment of judges to cases with better correlation to the various peaks and valleys of individual agency caseloads. This would eliminate agency overstaffing to meet surges in adjudicative activities in order to avoid backlogs and constituent complaints.

A Corps should produce significant cost savings through improved case management and reduced personnel needs. Savings could be achieved by the elimination of replicative facilities and support staffs employed by the 29 separate agencies and departments. Travel expenses for judges would be reduced by assigning cases to a qualified judge housed in a regional office instead of a judge based in Washington.

H.R. 1802 would permit any federal agency or court to refer any appropriate case to the Corps or to a specific judge to serve as a special master pursuant to Federal Rule 53(a). The ABA has not addressed this particular provision. However, this provision could encourage the federal courts to use administrative law judges as an additional source. In addition, all federal agencies could use the Corps' judges in any matter requiring a decision based on a hearing record. As caseloads become more evenly distributed among the Corps' judges, the Corps should be able to absorb such added duties without incurring added costs.

Finally, it should be noted that H.R. 1802 does not affect the manner in which candidates to be administrative law judges are reviewed and selected. The system administered by the Office of Personnel Management which is now in place for the merit selection of administrative law judges is left intact. The system is unique, should continue in effect with adequate financing, and should not be weakened in any way. It provides that applicants for administrative law judge positions must submit to rigorous written and oral examinations conducted by the Office of Personnel Management to demonstrate their legal expertise and judicial qualities. Applicants are further required to produce proof of at least seven years experience as judges or trial lawyers handling complex cases.

In conclusion, Mr. Chairman, on behalf of the American Bar Association, I wish to express our support for your efforts to improve the administrative judicial system through the creation of a government-wide corps of judges. As I have testified, H.R. 1802 is in accord with the Association's call for the establishment of a Corps. The advantages of a Corps of administrative law judges may be summarized as follows:

(1) Improved public perception of the fairness of the administrative process. This would be achieved through full compliance with the requirement that those conducting adjudications must be truly independent and free from any association or personal obligation to any party, in order that every party be afforded due process.

(2) Significant cost savings.

(3) More efficient and flexible use of the administrative law judges presently employed by 29 separate agencies and departments.

(4) Preservation of the merit selection system.

(5) Retention and enhancement of the expertise possessed by administrative law judges.

(6) Increased and better organized availability of administrative law judges to assist all agencies and federal courts.

Finally, I would like to reiterate that I do not believe that the bill changes the current decisional relationship between the judges and the agencies. Agency review of a judge's decisions would continue to operate just as it does today. Each agency would remain the final arbiter of its own policy, subject only to judicial review as presently provided under the APA.

Again, Mr. Chairman, I want to thank you and the Subcommittee for the opportunity to testify on H.R. 1802. Our Association stands ready to cooperate with you on this important legislation. I will be happy to respond to any question that you or members of the subcommittee may have.

Mr. GEKAS. We thank the gentleman. We now note the attendance of the gentleman from Illinois, Mr. Flanagan, a valued member of this subcommittee.

We'll now proceed to the third witness, Prof. Victor Rosenblum, who, as we understand it, has worked with Congressman Henry Hyde on many subjects for many years.

STATEMENT OF VICTOR G. ROSENBLUM, PROFESSOR OF LAW AND POLITICAL SCIENCE, NORTHWESTERN UNIVERSITY SCHOOL OF LAW

Mr. ROSENBLUM. Thank you, Chairman Gekas. It's a great privilege to be a witness with the committee this morning, and I've brought along a prepared statement that I hope can be made a part of the record.

Mr. GEKAS. Without objection, it will be included in the record.

Mr. ROSENBLUM. I should note that, having been on the faculty of Northwestern University now for some 35 years, that my great affection for my university should not be taken in any way as an endorsement by the university of what I am about to say today. I'm speaking as a private individual who has been studying the role of administrative law judges within the Federal system for much of that 35-year time.

And I would like briefly to refer to a study that I did some 20 years ago for the Administrative Conference of the United States, in which at the time I concluded that the time was not appropriate at that time, 20 years ago, for the establishment of a corps of administrative law judges. I felt that there were activities which were going on within the Civil Service Commission, the then Civil Service Commission, at the time that were designed to try to effectuate some important reforms within the system, particularly the work of what was known as the LaMacchia Committee that was undertaken by the Civil Service Commission at that time, was very promising with regard to the prospects for coordination, for overall improvement in the system, and for the heightening of morale, and the reaching of a series of economies.

My report to the Administrative Conference was subsequently published by this House in a volume called "Studies Relative to the Disability Hearings and Appeals Crisis," Committee on Ways and Means, committee print, 94th Congress, 1st session, in 1975. My 1975 assessment of the issue was that I don't believe the establishment of a new independent agency for ALJ's should be a priority at this time. And one might summarize the view at that time that essentially we ought to try to tune the engine before we trade the car.

In the 20 years since that time, it has become clear that what was for a time a promising series of reforms that were undertaken by the work of the LaMacchia Committee and the Civil Service Commission somehow went from a front burner invariably toward the back burner, and the focus upon the reform of the administrative law judge system, like many ventures that are vital and promising in their aspirations and potential, ultimately became a sputtering and evaporating venture that did not achieve its goals or, for amongst one of many reasons, that there were other priorities that the Civil Service Commission and its successor, the Office of Personnel Management, had to pursue.

It seems to me all the clearer that today, for the reasons that have been cited by the distinguished witnesses who have appeared before the committee before me this morning, that the time is, indeed, ripe and that we should not allow that time to become overripe for the establishment of a corps of administrative law judges.

The adoption of this statute would enhance both an ALJ's decision of integrity and the public's certainty that ALJ findings and rulings are objective and fair. As then Professors Scalia and Goodman pointed out in a 1973 article well before the coauthor became a Justice of the Supreme Court, "The central significance of the substantial evidence rule lies in limiting agency decision or rationales to the confines of the public record." The most pertinent role in evoking and assessing evidence in public hearing records and adjudicatory proceedings has fallen traditionally on the shoulders of the administrative law judges.

ALJ's are, in essence, vital components of a system of administrative decisionmaking that must be fair, equitable, economical, accountable, and efficient to serve the public interest. I believe that the bill that has been introduced is one that admirably states, especially in its findings at the outset, which are by no means mere boilerplate, but very significant, empirical findings representing the realities of our time, states the reasons and the objectives that would, indeed, be achieved through the passage of this statute. I am convinced that these findings are empirically sound, that they combine societal and institutional needs with common sense, and that they build a compelling reason and record for the adoption of your legislation.

Thank you very much.

[The prepared statement of Mr. Rosenblum follows:]

PREPARED STATEMENT OF VICTOR G. ROSENBLUM, PROFESSOR OF LAW AND POLITICAL SCIENCE, NORTHWESTERN UNIVERSITY SCHOOL OF LAW

My names is Victor G. Rosenblum. I have been a professor of law and political science at Northwestern University in Illinois for some 35 years. The affection I have for my school should not hold it accountable in any way for my opinions. I am here today testifying solely as a private individual. For purposes of identification I attach a brief biography.

The message of James Madison, Alexander Hamilton and John Jay in No. 51 of *The Federalist Papers* is as pertinent today to legislators and other government officials making decisions as it was for state voters deciding whether to ratify the Constitution two centuries ago. In framing a government to be administered by the people over the people, they maintained, "The great difficulty lies in this: You must first enable the government to control the governed; and in the next place oblige it to control itself." These dual obligations of government. to perform necessary and proper tasks but always with due regard for fairness. self control and prevention of abuse. were to be hallmarks of efficacy and of accountability.

As applied within the context of administrative agency actions. these tasks call for enhancement of regulatory efficiency. economy, and responsiveness to the mandates of Congress. and they necessitate adherence to constitutional and statutory standards of fairness. We have learned over the years that legislative goals can be jeopardized equally by administrative agency practices that are procedurally or substantively arbitrary or stagnant. To do their jobs well administrators must exercise and be held accountable for skills that implement the legislature's goals with proper regard for the public's interest in and right to competence, fairness and efficiency.

In a report I prepared for the Administrative Conference of the United States 20 years ago on "The Administrative Law Judge in the Administrative Process,"[1] I noted that, "The Civil Service Commission's record in handling hearing officer issues has not been devoid of controversy in the past, and there is no reason to expect the cessation of dispute over so central and sensitive an administrative role in the future. There will, no doubt. be further urgings and demands to supplant the Commission's ALJ functions with the creation of some equivalent of an Independent Office of Federal Administrative Procedure as was supported by an Attorney General's

[1] Studies Relevant to the Disability Hearings and Appeals Crisis. Committee on Ways and Means. U.S. House of Representatives. Committee Print (94th Cong., 1st Sess.) 1975, pp. 171–245.

Committee in 1941 and almost called for, after extensive study and discussion by the Administrative Conference, in 1962."[2] I expressed doubts in 1975 about the creation at that point in time of a corps of Administrative Law Judges.

My 1975 assessment of the issue was "I don't believe that establishment of a new independent agency for ALJs should be a priority at this time." Among my reasons for that view was the impression that the Civil Service Commission at that time was developing a potentially comprehensive and systematic instrument for empirical research into and evaluation of the ALJ program's strengths and weaknesses through the LaMacchia Committee study. I favored continuation at that time of the Administrative Conference's Recommendation 28–7 of December 1962 that provided:

> It is recommended that (a) The hearing examiner program continue to be administered by the Civil Service Commission under the following commitments made by the Commission: that the program be administered by a separate office or combined with the administration of a legal career service; that there be an advisory committee composed predominantly of lawyers of distinction; and that the evaluation of candidates for a hearing examiner register of eligibles include a written and an oral competitive examination. (b) Any successor organization to the Conference have as a part of its normal functions the continuous observation and periodic study of the policies and administration of the hearing examiner program.[3]

One might summarize that 1962 recommendation as "try to tune the engine before we trade the car." Conducted by a panel of ALJs and chaired by the Civil Service Commission's Deputy Counsel who was formerly an ALJ. the LaMacchia Committee undertook to survey all of the ALJs and samples of federal agency officials. private practitioners. and bar association representatives about the quality and quantity of ALJs' work products: relationships between the judges and their agencies and the standards for recruitment of ALJs and for review of their decisions.[4]

The LaMacchia Committee's 64 findings and conclusions under ten headings, ranging from appointment to utilization and morale of ALJs, were designed to provide a continuing agenda for distillation and refinement of specific Civil Service Commission recommendations by a "second level panel" to be appointed by the Commission from among "the representatives of agencies and organizations concerned with administrative processes." I concluded in my 1975 study that the Commission should be encouraged to proceed full speed ahead with the second level of the LaMacchia Committee report; for the Commission could thereby develop and apply valuable, consistent planning and reform measures in the ALJ program.

Like many ventures vital and promising in their aspirations and potential, the follow throughs on the LaMacchia Committee report were undertaken for a brief time by the Civil Service Commission and the Office of Personnel Management, then sputtered and evaporated in the years that ensued.

There were too many other needs and duties. especially in the aftermath of the transition from the Civil Service Commission to the Office of Personnel Management, to make the ALJ program a lasting priority. Attention lapsed and systematic inquiries and analyses floundered. I'm convinced that the time is ripe now for the passage of H.R. 1802 to provide systematic and effective administration, monitoring and direction of the ALJ program.

Adoption of the statute would enhance both ALJs' decisional integrity and the public's certainty that ALJ findings and rulings are objective and fair. As Professors Scalia and Goodman pointed out in a 1973 article well before the co-author became a Justice, the central significance of the substantial evidence rule lies in limiting agency decisional rationales to the confines of the public record.[5] The most pertinent role in evoking and assessing evidence in public hearing records in adjudicatory proceedings has fallen on the shoulders of ALJs.

Administrative Law Judges are, in essence, vital components of a system of administrative decision making that must be fair, equitable, economical, accountable, and efficient to serve the public interest. Functioning optimally, the ALJs are expert, independent fact-finders and record analysts whose finely honed skills as pre-

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[2] "Administrative Procedure in Government Agencies." Report of the Committee on Administrative Procedure Appointed by the Attorney General. S. Doc. No. 8. 77th Cong., 1st Sess. (1941), Chap. VIII, 123–127: Report of the Administrative Conference of the U.S. (December. 1962), Recommendation 28–7.

[3] Report of the Administrative Conference of the U.S. (December 1962) Recommendation No. 28–7.

[4] U.S. Civil Service Commission. Report of the Committee on the Study of the Utilization of Administrative Law Judges (July 30. 1974).

[5] Scalia and Goodman. "Procedural Aspects of the Consumer Product Safety Act." 204 *U.C.L.A. L. Rev.* 889, 935 (1973).

siding officers and evaluators of the credibility, weight and thrust of evidence facilitate efficient and just applications of policy and disposition of cases by the nation's regulatory bodies. What is needed for ALJs to maximize their performance of these functions? I believe the answer is HR 1802. By establishing the ALJ Corps. the statute would eliminate the stigma that the public sometimes attaches to judgments reached by "employees" of an agency. It would also systematize and refine processes for selection. oversight and complaints concerning ALJs.

Section of the bill, its findings. states succinctly and admirably how the corps of ALJs meets these needs:

> The Congress finds that—
>
> (1) in order to promote efficiency, productivity, the reduction of administrative functions, and to provide economies of scale and better service and public trust in the administrative resolution of disputes. Federal administrative law judges should be organized in a unified corps;
>
> (2) the dispersal of administrative law judges appointed under section 3105 of title 5, United States Code, in every Federal agency that requires hearings to be conducted by administrative law judges. underutilizes the potential of administrative law judges to serve the public and assist the Federal courts as special masters and finders of fact in specific instances to help reduce the backlog of cases in Federal courts;
>
> (3) the organization of administrative law judges in a corps will best promote their assignment to Federal agency needs as demand requires;
>
> (4) a unified administrative law judge corps will better promote the use of information technology in serving the public; and
>
> (5) an administrative law judge corps will, through consolidation, eliminate unnecessary offices and reduce travel and other related costs.

I'm convinced that these findings are empirically sound, that they combine societal and institutional needs with common sense. and that they build a compelling case for proceeding now to establishment and implementation of the Administrative Law Judge Corps as set forth in H.R. 1802. I'll be happy of course to enlarge on these views in the subsequent discussion.

Mr. GEKAS. We thank you for your testimony.

And we'll begin a round of questioning with an allotment of 5 minutes to the Chair, which will be strictly observed, and then we'll turn to other members of the subcommittee.

First, I'd like to ask Judge Hardwicke the following question, which will emphasize something that was very important that he said, in my judgment: after the massive change that Maryland made, an administrative agency looking at a favorable decision by a now independent administrative law judge and finding that its original position was substantiated might be inclined to reconsider those objections that would have caused them earlier to ask the Governor to exempt them. Did you find empirical evidence of a feeling of satisfaction on the part of the agencies?

Judge HARDWICKE. Well, Mr. Chairman, they frequently find against the agency position.

Mr. GEKAS. This I know.

Judge HARDWICKE. The quality of justice, it seems to me, is well served by a fair and impartial decider. And when you have litigants who lose who walk away from the litigation satisfied that they have had their day in court, then the court has done its proper job. We feel that there is great satisfaction, both from the losers and the winners, when they feel that they have had a fair hearing. So that the agencies, sometimes they lose and sometimes they win. Whether they win or lose makes no difference with regard to the success of our judges or our agencies.

I think the agencies like the system better because they get an opportunity to present their position to a fair and impartial decider. The other way, they're presenting their position to one of

their employees, and there certainly is not that satisfaction, and the agency does not do as good a job.

Mr. GEKAS. I thank the gentleman. I feel good about the fact that you have brought to our hearing an actual working model, as you said in your introductory remarks. So we can take our bill and find a vision of how it will work. And so that's been invaluable to us.

Mr. Miller, you mentioned the Merit Systems Protection Board. What did you find in the past that makes their role under the bill valid?

Mr. MILLER. Well, it's been the traditional way of handling removals at this level of importance in the Government. A proceeding had to be brought by the agency or department. They could not simply fire an ALJ with whom they differed. That's part of the independence assured by the Administrative Procedure Act. So the formality is there. Under the bill you might say that the judge is given a second shot. After the Complaint Resolution Board has ruled against him and concluded that he should be removed or she should be removed, he does have an appeal to the Merit Systems Protection Board. It's an additional protection for the ALJ.

Mr. GEKAS. We have a statement that was offered to us for the record on that subject. We have it from an ALJ with the Merit Systems Protection Board Professional Association.

[Mr. Gekas confers with staff.]

Mr. GEKAS. All right, we'll receive that into the record, without objection.

[The prepared statement of Judge Markuns follows:]

PREPARED STATEMENT OF HON. JOHN F. MARKUNS, ADMINISTRATIVE JUDGE, MERIT PROTECTION BOARD PROFESSIONAL ASSOCIATION

I am John F. Markuns, Chairman of the Merit Systems Protection Board Professional Association's (MSPBPA's) Special Committee on Legislation.[1] I am pleased to submit this statement on behalf of the administrative judges (AJ's) represented by the MSPBPA. I thank the Chairman and the Subcommittee for the opportunity to present our views concerning H.R. 1802, the Reorganization of the Federal Administrative Judiciary Act. We fully support H.R. 1802's concept of consolidating federal administrative adjudications to achieve economies of scale and to reduce large case backlogs by assigning ALJ's on an as-needed basis. Indeed, we appear before you because we believe that our agency, the Merit Systems Protection Board, can both contribute to and benefit from this legislation.

There is a report of the House Appropriations Subcommittee on Treasury, Post Office and Civil Service, which has been adopted by the full Appropriations Committee, to merge the MSPB with the Federal Labor Relations Authority (FLRA). A major reason cited in the report for such a merger is to encourage economies of scale, also one of the major goals of H.R. 1802. As currently written, however, H.R. 1802 includes FLRA in the new Corps but does not include the MSPB. We view this omission as an opportunity lost, and an obstacle to achieving the efficiencies accompanying consolidation envisioned both by the sponsors of H.R. 1802 and the Appropriations Committee.

We believe that MSPB's omission from the proposed Corps is primarily the result of an historical anomaly that should be corrected before passage of H.R. 1802. MSPB's cases include appeals by federal employees from major disciplinary actions for reasons ranging from poor performance to serious misconduct such as embezzlement or sexual harassment. These cases typically take up the majority of an MSPB AJ's time. MSPB also considers retirement related appeals, including disability retirement, reduction-in-force (RIF) appeals, and allegations of reprisal for whistle blowing. Congress has authorized all of these cases to be heard by ALJ's[2]—only the fact that MSPB employed only one ALJ and administrative problems associated

[1] Because of conflicting demands created by an extremely heavy caseload, I recently relinquished my dual position of First Vice President.

[2] *See* 5 U.S.C. section 7701.

with the 1978 reorganization of the Civil Service Commission into MSPB and OPM prevented Congress, in passing the Civil Service Reform Act, from requiring the use of ALJ's.[3]

As the Chairman of this Subcommittee is well aware, there have been several recent attempts to correct this historical anomaly, beginning with the introduction of H.R. 5239, the "Merit Systems Protection Board Administrative Judges Protection Act of 1992." This bill was reintroduced in the following session as H.R. 1889 and received a favorable hearing by the House Subcommittee on Post Office and Civil Service while it considered reauthorization of MSPB. On behalf of MSPB's AJ's, I at this time extend a special thanks for the Chairman's recent reintroduction of this bill as H.R. 1989. Each of these bills has provided for a phased-in conversion of MSPB's administrative judges to ALJ status. Both the former Chairman of the House Appropriations Subcommittee on Treasury, Post Office and Civil Service and a former Chairman of MSPB are on record as supporting conversion. In December 1992, the Administrative Conference of the United States (ACUS) recommended conversion of MSPB AJ's to ALJ status. In addition, this proposal has been well received by both the employment law bar and the administrative law community.

MSPB AJ's are well qualified to be included in the ALJ corps. Adjudications conducted by MSPB AJs are adversary proceedings substantially equivalent to those conducted by ALJ's. MSPB requires the use of APA-type procedures to conduct its hearings. MSPB AJ's are authorized to issue initial decisions and have the authority to issue subpoenas, order discovery, grant interim relief, and award attorney fees. Initial decisions which become final are subject to judicial review by the United States Court of Appeals for the Federal Circuit. The Federal Circuit has held that the credibility determinations of an MSPB administrative judge are entitled to deference and are "virtually unreviewable" by that court. *See Holloway* v. *United States Postal Service,* 993 F.2d 219, 222 (Fed. Cir. 1993). MSPB AJ's, who hear both workplace disputes and retirement claims, have specialized experience in both the labor relations and benefit areas. Thus, MSPB AJ's would fit equally well in both the division assigned labor relations disputes where, presumably, FLRA will be assigned, and the division assigned Social Security and other benefit claims.

Cross-training will clearly not be a problem for MSPB AJ's. Since legislative conversion efforts first began in 1992, 20 colleagues have left MSPB to become ALJ's. At least another 18 AJ's have been certified on the ALJ. register. Others are certainly in the process of applying for certification. Experience as an MSPB administrative judge has been deemed fully qualifying by OPM. To our knowledge, no MSPB AJ who has applied for the register has failed to certify.

Inclusion of both MSPB and FLRA in the Corps would afford the full advantages of immediate consolidation of similar adjudicatory functions, while allowing both agencies the additional time needed to address the thornier questions associated with merging the enforcement functions, the appellate functions, and the politically appointed boards of the two agencies. Inclusion of both agencies in the Corps would soon result in significant savings in both administration and travel. Perhaps most importantly, inclusion would allow the Corps to assign any underutilized ALJ's to assist in handling what we anticipate will be an increasing MSPB caseload resulting from government-wide restructuring efforts.

Including MSPB in the Corps offers other advantages as well. MSPB has been a pioneer in developing and implementing a computerized docketing and tracking system for its cases. I have been employed by MSPB almost since its inception and can personally attest to the reliability of the system. Indeed, its reliability in monitoring case files permitted MSPB several years ago to eliminate its practice of maintaining duplicate case files. MSPB AJ's are virtually all "computer literate" and routinely draft their work product directly on their P.C.'s. Several AJ's utilize notebook computers at hearing. MSPB AJ's and its offices are networked for electronic mail. MSPB is currently engaged in a highly successful flexiplace experiment involving 12 AJ's in several field and regional offices. MSPB AJ's are all fully trained in a variety of computerized legal research systems, and this capability is available on our desk tops. MSPB AJ's are highly skilled in conducting telephonic conferences and in facilitating settlement, processes which evolved while MSPB engaged in its Voluntary Expedited Appeals Procedure (VEAP) experiment in the mid-80's. As a

[3]The Conference Report accompanying the Civil Service Reform Act of 1978 expressed Congress's preference for using ALJ's, particularly for removal cases, but explained that use of ALJ's would not be required because the former Civil Service Commission employed only one ALJ and there was concern about the "serious administrative problems that would ensue" from requiring the use of ALJ's at that time. Congress did direct the Board, however, to use the most experienced appeals officers available. See S. Conf. Rep. No. 95–1072, 95th Cong., 2nd Sess. 138 (1978).

direct result of that experimentation, MSPB's settlement rate more than doubled, from 25% to 50%. MSPB AJ's continue to innovate: MSPB is in the midst of a settlement judge pilot project and is evaluating its first attempt at a video-hearing. MSPB would bring to the Corps a culture of innovation and needed technological experience and expertise.

Transferring MSPB's 69 AJ's, most of whom are at the GS–15 level, to the Corps should be cost-neutral during the transition period. We have previously shared several ideas with the Appropriations Subcommittee, including a $2500 cap on any initial pay increase which might result from conversion to the ALJ pay scale. These ideas, coupled with the transition provisions set out in H.R. 1989, should result in a seamless transfer of MSPB's adjudicatory functions to the Corps. The conversion and transfer of MSPB AJ's would also ensure that MSPB would retain its most experienced adjudicators, and stop the drain of its AJ's to the ALJ ranks of other agencies.

Inclusion of MSPB in the Corps would result in one other advantage deserving of mention. H.R. 1802 as written provides for MSPB to act as the final authority on removal actions taken against ALJ's. Because of the historical anomaly previously mentioned, i.e., MSPB's employment of only one ALJ, MSPB's appeals procedure for ALJ's facing disciplinary action has come under heavy criticism from many in the administrative law community. ACUS has recommended that MSPB use 3judge panels to hear ALJ disciplinary actions. Moreover, following testimony during the last Congressional session from the Association of Administrative Law Judges Inc., who represent Social Security Administration ALJ's, a report of the House Appropriations Subcommittee on Treasury, Post Office and Civil Service directed MSPB to study conversion of its AJ's to ALJ status to create an adequate pool of ALJ's to form 3-judge panels to hear ALJ disciplinary cases. Inclusion of MSPB in the Corps would obviate the need for MSPB to implement this recommendation.

Should MSPB be included in the Corps, however, we respectfully suggest that 1802 be further revised by making the Complaints Resolution Board the final authority for ALJ removals. We also suggest that an ALJ subject to complaint be permitted to engage in discovery as is allowed in MSPB proceedings, and that the Complaints Resolution Board final decision be subject to judicial review. These additional revisions would, for the first time, also afford MSPB AJ's a right to appeal disciplinary actions to an authority outside the MSPB. Currently, MSPB's appeals procedure requires an MSPB AJ to appeal a disciplinary action to MSPB's sole ALJ, who shares direct managerial authority over MSPB AJ's with MSPB's Acting Senior Executive for Regional Operations.

We conclude by offering our continuing cooperation as H.R. 1802 proceeds through the legislative process, and by again thanking the Chairman and the Subcommittee for the opportunity to present our views on this important piece of legislation.

Mr. GEKAS. We thank you, Mr. Miller.

I'd like to turn for one question to Mr. Rosenblum, are you saying that long ago, when you had this assignment from the Administrative Conference, that you rendered a final report rejecting the idea?

Mr. ROSENBLUM. Well, I rendered a consultant's report——

Mr. GEKAS. Oh, consultant's.

Mr. ROSENBLUM [continuing]. To the Conference 20 years ago, in which I didn't reject the idea as such, but said that the time was not ripe 20 years ago for the establishment of a corps, because there were reform efforts that were being undertaken at that point by the Civil Service Commission that looked very promising. Then, as the Congressman knows, there were the administrative changes which divided the Civil Service Commission into the Office of Personnel Management and the Merit Systems Protection Board. There were brief flurries of interest in the implementation of the reforms that had been proposed by the LaMacchia Committee, but then those faded into disuse and disrepair, and things continued pretty much as they had been without the promised reforms being achieved.

I think the Congressman's bill contains the key components for the reforms which are necessary in order to maintain an effective and economical system of administrative adjudication.

Mr. GEKAS. I thank the gentleman.

The time of the Chair has expired. We turn to the ranking minority member, Mr. Reed, the gentleman from Rhode Island, for any questions he may wish to pose.

Mr. REED. Thank you, Mr. Chairman.

I would like to thank the witnesses for their very insightful testimony.

And, Judge Hardwicke, I presume that in Maryland practice that appeals may be taken to district courts from agency proceedings?

Judge HARDWICKE. Appeals lie from our—when we make a final decision, Mr. Reed, the final decision is appealed to the circuit court, which is our lowest nisi prius court. When we make recommended decisions to the agency, those recommended decisions are then appealed to the agency head or the commission in charge of the agency responsibility.

Mr. REED. Have you noticed any significant decrease in appeals based upon the reorganizations you've made?

Judge HARDWICKE. Yes, very substantial. We estimate that approximately 3 percent of our cases are actually appealed to the court.

Mr. REED. Very good. One other point, and I'm very encouraged by your empirical evidence, but one other point is that all of these discussions I think have to be put in the context that this administrative proceeding in most cases in Federal practice—and I'm not the expert; you're the expert—in the Federal practice there is generally an appeal to a Federal district court. And I wonder just—and this is more sort of philosophical than anything else—whether or not the rigorous approach that's embedded in this legislation is necessary, given that ultimately someone can, either the agency or the individual involved, can get to a Federal district court. And I just wanted a comment; perhaps you can weigh in.

Judge HARDWICKE. Let me deal with it first——

Mr. REED. Yes.

Judge HARDWICKE [continuing]. And I'm sure my colleagues here on this panel will add to this.

Most of the appeals are on the record, and the old function—the basic function of a hearing in the executive branch is to develop a full record. There is a presumption that attaches to the findings of the person who hears. There's an old common law maxim: "Qui audit decidit." "He who hears decides." And the whole idea is that you don't want to have a frustrated hearing and then have somebody else make a decision who was not present at that hearing. Otherwise, the whole thing becomes an exercise in futility and frustrates justice.

So when you go to the court with your appeal or go up to the agency head, you go up on the record developed by the hearing judge, and that would be true—that's true of the Federal system; it's true of the State system. The common law techniques are applicable equally in the Federal system as in the State.

But we're not—I've had a fair amount of practice as a lawyer before Federal agencies, and I found that the expertise that was built

into the Federal agencies was somewhat overwhelming, and I was there as a lawyer. When citizens come before Federal agencies, the nature of being overwhelmed must be even greater, and sometimes in the Federal agencies you will have 7 or 8 years devoted to a case.

It seems to me that when we're talking about lessening power and lessening the controls of government, that this is one area that this bill, this legislation that you have before you, members of this committee, are one of the very key basic and philosophical ways to give better justice to people, aside from the technicalities of the court proceedings and the nature of the appeals.

That's a long-winded answer and I'm sure my colleagues can improve upon it, but——

Mr. REED. Mr. Miller, please?

Mr. MILLER. The bill itself doesn't make the present administrative procedure any more complicated than it is at the present time. In fact, it offers some promise of making things easier. There is provision for a study of procedures in the hopes to make them more uniform throughout the Federal Government. So you don't have to be an expert in an arcane area in order to come before an agency and represent a client. That I see as really an improvement.

But to address more philosophically your question, people don't have unlimited resources. They want to have their decision as cheaply, you might say, as possible. So the better we can make the system work at the administrative law judge level, the better the chance that you'll have justice rendered. People's means deplete as you go higher and higher.

Mr. REED. Let me—and Professor Rosenblum would like to respond, too, but just to interject—some agencies are highly technical, the Nuclear Regulatory Commission, et cetera. Then there are some that are very much less technical like the Social Security Administration, where you're talking about the person is ill and the medical records are all together. At that level, the administrative law judge or the old hearing officer is as much, I think, kind of a facilitator in some cases as he is the popular image of the judge sitting back on dias and rendering these great decisions. And I wonder if we lose some of that, and that goes to the resources of the Government, as well as the resources of the plaintiff. I just want to interject that.

But, Professor Rosenblum, you might have a——

Mr. GEKAS. The Chair yields an additional 3 minutes to the gentleman from Rhode Island.

Mr. REED. I thank the Chair.

Mr. ROSENBLUM. Well, my impression, Congressman, is that nothing will be lost here, that the bill recognizes the elements of the special skill and special knowledge by establishing those divisions within the corps, but at the same time there will be the opportunities for coordination and for a much more efficient and economical allocation of ALJ functions.

My expectation would also be that, as a consequence of this greater overall coordination and efficiency, that we're likely to see many Federal district court judges having a lot more respect for the work that's done by the judges and to see much less of the conflict that we've been seeing between what Federal district judges

have often found and what the agencies have concluded when they have exercised more control over the work of the administrative law judges.

Mr. REED. Thank you.

Let me just, if I may, indulging the chairman's gracious offer of time, raise another topic. I notice that in the selection of the Chief Judge and the council that they're Presidential selections for a term of 5 years. That creates the possibility that a political agenda could be served, regardless of who's the President, in terms of simply assigning individual judges to different departments in different types of cases. Say you have a particular animus about how the Social Security system is paying out too many benefits; if—and I'm suggesting worst case certainly—that there is a possibility that you simply don't provide all the extra judges that they might need or, in the case that Mr. Frank brought up, NMFS, the National Marine Fisheries, if you're upset about fishing problems and you want to put them on the back burner, you just continue to have one ALJ assigned to NMFS cases and you don't get a lot of adjudication done.

And the other issue, too, I'd raise—and I want to put it all together and ask for your comments—is that I notice that there's no requirement that the Chief Judge, or at least a Chief Judge, and maybe the other division judges, be ALJ's. They simply have to be learned in the law, which in this present version could create a situation where anyone could be appointed to the Chief Judge of the ALJ corps whose credentials might be as much political as jurisprudential.

Mr. GEKAS. Would the gentleman yield?

Mr. REED. Yes, I would, Mr. Chairman.

Mr. GEKAS. I wonder what the situation is in Maryland.

Judge HARDWICKE. I'm the only Chief Judge that Maryland has ever had, but prior to my being Chief Judge I was a practicing attorney. So, consequently, I suppose that I'm prejudiced to tell you that I do not see any reason that a Chief Judge has to have prior experience as a judge. In our system, of course, you name Federal district judges, you name Supreme Court Judges who have no previous background as a judge.

It seems to me that this bill is carefully crafted deliberately to omit the requirement that your Chief Judge be a prior judge in order to give him a broader perspective. There's a tremendous amount of advantage in having the chief person have the large perspective that sometimes one who has never—who has his basic experience as a judge would not have. I think the bill is very correct in that respect.

Mr. REED. Mr. Miller, please.

Mr. MILLER. It's an improvement in this sense: right now the individual agencies' Chief Judges are appointed under what is strictly a political process. The OPM has nothing to say about who is the Chief Judge. A virtue of the new bill is that the President will appoint the candidate, who must then appear before the Senate. So there is that kind of reckoning, you might say. You can't just put a bounder in there and get by with it, not in today's atmosphere. So I think that's an improvement.

Second, the requirement that judges hear cases in rotation is supposed to be respected. I think that's in the statute, and that is not going to be changed by the bill. The safeguards that now exist will be there. That doesn't mean that if you have a malefactor he can't do something wrong. But the Congress will not lose oversight over the corps.

Mr. REED. Anyone.

[No response.]

Mr. REED. Thank you very much. Thank you, Mr. Chairman.

Mr. GEKAS. Yes. I want to commend the gentleman from Rhode Island on posing an excellent line of examination, particularly with respect to the effect of appeals and incidence of appeals. That's a much needed element for the record as we proceed on this piece of legislation.

We thank the panel and we will refer back to them, I'm sure, as this legislation moves to its next stage.

The next panel is made up of the Honorable Christine Moore, who will be appearing on behalf of the Honorable William A. Pope, president of the Federal Administrative Law Judges Conference; the Honorable Eli Nash, president of the Forum of United States Administrative Law Judges, and the Honorable Melford Cleveland, president of the Association of Administrative Law Judges, Inc.

So we will begin with the testimony of the Honorable Christine Moore.

STATEMENT OF HON. CHRISTINE MOORE, ON BEHALF OF HON. WILLIAM A. POPE II, PRESIDENT, FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE

Judge MOORE. Mr. Chairman and members of the committee, good morning. I'm honored to be here this morning on behalf of the Federal Administrative Law Judge Conference, of which I am an officer. The conference is a voluntary professional association formed almost 50 years ago, about the time of the passage of the Administrative Procedure Act, and we currently represent over 550 members. Ours is the only organization that represents judges from every Federal agency.

I would ask at this time that the Chair make, as a part of the written record, our written statement submitted by Judge Pope.

Mr. GEKAS. Without objection, it will be admitted into the record.

Judge MOORE. Mr. Chair, our position in brief is that the conference supports the creation of an independent, unified corps among the administrative judiciary separate from the agencies whose cases they adjudicate. H.R. 1802 accomplishes this while at the same time preserving the agency's policymaking authority in section 599(d). We do applaud this committee's efforts. The bill is important. This is good work and it's good government.

As I make my remarks, Mr. Chairman, I ask you to keep clearly in mind that the conference wishes to do nothing that will endanger or impede the creation of an independent, unified corps. We are not here today to oppose the bill. We are because we want a better way to do our jobs.

We believe that a unified corps will enhance the reality and public perception of fairness in the administrative judicial process and at the same time make us more efficient and productive. Every

State that has instituted a central panel or a corps, including my home State, the State of Washington, has experienced success with it, and we anticipate the same result on the Federal level.

I must say that the last time I heard that the States had instituted panels there were 15 of them, and I was gratified to hear today that there were 22. I don't know which other States have been getting on the train, but it sounds like it's an idea that is gaining currency.

We understand the goals of H.R. 1802 to be enhanced efficiency, cost savings, professional accountability, and independence. And, as judges, we are not just professionals, but public servants. So we welcome these goals and we will work to support them.

While we endorse the bill's goals, we are unable to support the bill in its present form, not because it creates an independent corps, but because we believe that the bill's mechanisms may be flawed and not achieve its goals, and actually undermine its fundamental purposes. In our view, the bill needs refinement and we're here today to offer our assistance in making an independent corps work.

As has been said by previous speakers, our decisions affect the lives of millions of Americans, and we are the bastions for the U.S. district courts who would be overwhelmed if they had to do the cases that we hear. It is essential that our decisions be, and be perceived to be, free of undue influence, but we have seen time and time again that Congress' efforts to protect our independence have been thwarted by agencies. We see the ALJ system as potentially a great one that should not be at the risk of destruction by agencies or bureaucrats, and, therefore, we have the following recommendations to H.R. 1802.

We recommend that the corps be based on the Federal judiciary model. We recommend that the Chief and the division Chief Judges be administrative law judges who have qualified for the job, who have walked in our shoes and understand the administrative judicial function. Management by agency bureaucrats has made the system in some agencies go terribly wrong, and we do not want to see that happen in the corps. Under the Federal judiciary model, the Chief Judge of the district court is a judge just like his or her colleagues, and that should be the case in the corps.

I do recognize that the Department of Justice recommended that the sole qualification to be Chief or division Chief be that one is learned in the law, and while we respect the agency's right to that position, it is we judges who have been there. Many of us have experienced management by those who do not understand the judicial function and may even resent due process because it conflicts with bureaucratic goals.

Our second recommendation concerns the potential for improper pressure by management in the corps if the bill is enacted in its present form. We would like to see additional provisions to narrow and define the powers of the Chief and division Chief Judges to preclude improper pressure either by reward or punishment, and, therefore, we would like to see objective standards in terms of how involuntary reassignments are made, transfers, RIF's, and appointment of the judges who constitute the peer review system. We think that revisions can make this bill work, and it is better to

have objective standards rather than leaving those matters entirely to the discretion of management.

And our third concern and recommendation has to do with the appropriations cap. This bill laudably creates substantial cost savings, according to the CBO analysis. In view of those savings, the addition of an appropriations cap may be neither necessary nor in the public interest. And I say this because we judges do not control our incoming caseload. You have cases to adjudicate; you do them. If caseloads increase dramatically, as we have seen happen in the Social Security system, the adverse impact on the delivery of due process can increase geometrically, causing impermissible delays in scheduling, hearing, and deciding cases, the majority of which affect individual citizens. And I've been there; I've heard these cases. These are not nameless, faceless parties; they are your constituents. And we suggest that instead of an appropriations cap there be the time-tested method of congressional oversight.

And I would conclude by saying that we are here to offer our assistance in achieving the goals of H.R. 1802. We offer our cooperation, and that concludes my remarks. Thank you.

[The prepared statement of Judge Moore follows:]

PREPARED STATEMENT OF HON. CHRISTINE MOORE, OFFICER, FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE

I am Judge Christine Moore. I am an officer in the Federal Administrative Law Judges Conference ["FALJ" or "the Conference"]. I am testifying at the request of Judge William Pope, President of FALJ, who is unable to attend these hearings due to previously scheduled hearings. On behalf of the Conference, we thank the Committee for this opportunity to speak on the pending legislation. We support this Committee's efforts: the proposed bill is important; it is good public policy; and good government.

FALJ is a voluntary professional association, organized almost 50 years ago for, among other things, improving administrative judicial process. We have over 550 members, representing every federal agency that employs administrative law judges. Federal administrative law judges conduct formal trial-type hearings under numerous statutes and regulatory programs. Our cases range from disability and compensation claims to transportation and workplace safety; securities, environmental, and energy regulation; mine safety; and labor relations. There are over 1300 federal administrative law judges. Our work touches the lives of millions of Americans, and supports the work of the federal courts, who would be overwhelmed if required to adjudicate the cases we handle. Independent administrative adjudication is essential to assuring due process to the citizens who appear before us. Unfortunately, Congress' longstanding efforts to preserve our independence have, to date, proved incapable of insulating administrative law judges from improper influence by the agencies they work for.

FALJ supports the concept of an independent unified corps of administrative law judges. We believe creation of a corps separate from the agencies whose cases they adjudicate will enhance the reality and public perception of fairness. At the same time the bill preserves to the agencies their policymaking authority (§§ 599d(f)). We also support provisions for achieving efficiency and cost savings; and for instituting a system of accountability among judges by way of a peer review system. As professionals and public servants, we believe we owe this to the citizens we serve.

At the same time, FALJ cannot support H.R. 1802 in its present form. We take this opportunity to express our concerns and our willingness to work toward improving the bill before this Committee. Our concerns fall into three major areas:

1. That the powers of management in the corps—the chief administrative law judge and the division chief judges—are broad and insufficiently defined, creating the potential for infringement on decisional independence through actions such as involuntary reassignments and transfers (§ 599b(d)(1)); reductions in force, which are not addressed in the bill, and control of adjudicative appointments in the disciplinary system (§ 599e(e)). Specific controls must be included to define the powers of the chiefs and division chiefs.

2. That the chief judge, who is appointed by the President, need merely be "learned in the law" and is potentially removable at any time (§ 599). This creates the potential for improper management by a person who does not understand the judicial function, a situation that has occurred in many agencies and interferes with the delivery of due process to our citizens. It also subjects the chief to improper influence, due to the threat of removal.

3. That the appropriations cap may well impair the efficiency, productivity, and delivery of due process to the public, given that judges do not control their incoming caseloads. The bill already provides for savings from efficiencies of scale. We suggest the time-tested method of Congressional budget oversight as a means of assuring fiscal responsibility within the corps, while assuring that the corps has adequate resources to serve the litigants who appear before us.

I shall be happy to respond in greater detail to your questions.

[The prepared statement of Judge Pope follows:]

PREPARED STATEMENT OF HON. WILLIAM A. POPE II, PRESIDENT, FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE

I am Judge William A. Pope, II, President of the Federal Administrative Law Judges Conference ["FALJ" or "the Conference"]. I have designated Judge Christine Moore, who is Secretary of the Conference, to speak in my stead on behalf of the Conference I thank the committee for the opportunity to present the views of the Conference concerning Congressman Gekas' bill, H.R. 1802, the Reorganization of the Federal Administrative Judiciary Act. We applaud this committee's efforts in this legislation. What the committee is doing in the proposed bill and these hearings is important; it is good public policy; and it is good government.

The Conference's position, in brief, is that we support the concept of an independent unified corps of administrative law judges. My goal in testifying today is to convey our thoughts on improving the bill before you. We have concerns with the proposed bill that it is our responsibility to address at this time. Our concerns fall into three major areas. These are:

1. That the selection process for chief and division chief administrative law judges is not based on merit, that is, the appointees need not have competed and qualified to become administrative law judges, a situation that undermines proper management of a judicial corps.

2. That the powers of the chief administrative law judge and the Council of the Corps are broad and insufficiently defined, creating the potential for infringement on decisional independence through actions such as involuntary reassignments and transfers (§ 599b(d)(1)), reductions-in-force [RIFs] (not addressed in the bill), and control of appointments in the peer review system (§ 599e(e)).

3. That the appropriations cap for the period 1996–2000 is likely to impair the efficiency, productivity, and delivery of due process that we owe to the public.

I now take this opportunity to provide an overview of the Conference, a description of the unique judicial functions of administrative law judges, and some of the already existing statutes indicating Congress' longstanding concern with assuring their independence. Judge Moore will answer any questions the Committee may have with respect to our position on the bill.

OVERVIEW

FALC: The Federal Administrative Law Judges Conference [FALJC] is a voluntary professional association, organized almost 50 years ago for the purpose of improving the administrative judicial process, presenting educational programs to enhance the judicial skills of administrative law judges, and representing the concerns of Federal administrative law judges in matters affecting the administrative judiciary. The Conference has almost 500 members, drawing from every federal agency that employs administrative law judges. Over the years, the Conference has taken leadership roles in preserving the decisional independence of administrative law judges, supporting measures enhancing due process of law in administrative judicial proceedings, and in supporting improvements in the administrative judicial process and in the status and pay of the judges who make up the administrative trial judiciary.

Functions of ALJs: Federal administrative law judges perform a unique judicial function within the Executive branch of the U.S. government. They conduct formal trial type hearings in cases arising under a wide variety of Federal statutes and regulations; interpret the law; apply agency regulations; and issue written or oral deci-

sions. The U.S. Supreme Court has said that the role of a Federal administrative law judge is "functionally comparable" to that of federal trial judges. *Butz* v. *Economou*. 438 U.S.478, 513 (1978). In 1946, Congress enacted he Administrative Procedure Act [APA] to ensure a fair, impartial and objective agency decisional process, vesting the responsibility for conducting on-the-record hearings in administrative law judges (formerly called hearing examiners). Under the APA and other Federal statutes, administrative law judges are intended to have complete decisional independence, and to protect that independence, have "tenure very similar to that provided for Federal judges under the Constitution." Sen. Rep. No. 95–697, 95th Cong. 1st Sess. 2 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 496, 497. Unfortunately Congress' diligent efforts in providing statutory protections has not, in practice, prevented some Federal agencies from attempting to interfere with the decisional independence of their judges, as we have seen time and again with Social Security, the Department of Interior, and the like. We understand that the purpose of the current legislation is to create an independent corps structure that will promote both efficiency and independence, and in essence, will fulfill the original intent of the APA.

Current arrangement: There are over 1,300 administrative law judges assigned to 31 Federal agencies. The agency employing the largest number of administrative law judges—over 1,050—is the Social Security Administration. Two other agencies with large numbers of judges include the Department of Labor and the National Labor Relations Board which employ about 70 judges each. The remaining administrative law judges are employed in agencies with one to nineteen judges. Although all administrative law judges are assigned to specific agencies, under a program administered by the Office of Personnel Management, judges from one agency can be assigned to hear cases for another agency when case loads warrant such action, although this can in some instances be an awkward process.

Cases adjudicated by ALJs: Administrative law judges adjudicate cases falling into three broad categories: regulatory cases; entitlement cases; and enforcement cases. Their decisions directly affect the lives of far more Americans than do the decisions of all of the United States district courts. It is estimated that administrative law judges hear as many as four times the number of cases heard by the United States district court, and they do that more swiftly and at lower cost. Indeed, the United States district and appellate courts would be overwhelmed if they suddenly had to assume responsibility for the cases that are now tried before Federal administrative law judges. Administrative law judges play a vital role in ensuring that American citizens receive due process of law from their government.

Congress' concern with ALJ independence and efficient service to the public: Over the years, Congress has undertaken numerous legislative efforts to protect and preserve the decisional independence of administrative law judges. Many of these have been very effective, but nevertheless have proved incapable of insulating judges from improper political and management influence. Just as in the courts of the United States, decisional independence of the judges who render decisions in the administrative judicial process is the single most critical element of due process of law and is the key to the public's perception of fairness in the administrative hearing process. To ensure their decisional independence, administrative law judges have absolute appointments, and are not subject to agency efficiency ratings, promotions, or demotions. Some of the specific protections enacted by Congress to protect the decisional independence of administrative law judges include:

(1) requiring agencies to appoint as administrative law judges only persons certified by the Office of Personnel Management as qualified on the basis of merit [5 U.S.C. §§ 1104 and 3105];

(2) exempting the pay of administrative law judges from agency performance recommendations and ratings prescribed for other civil services employees [5 U.S.C. §§ 4301(2)(D) and 5372];

(3) requiring that rulemakings and hearings be assigned to administrative law judges in rotation as far as practical [5 U.S.C. § 3105];

(4) requiring that decisions of administrative law judges be made after an on-the-record hearing [5 U.S.C. § 554];

(5) prohibiting ex parte communications with administrative law judges [5 U.S.C. §§ 551, 556, and 557(d)];

(6) prohibiting agencies from assigning duties to administrative law judges that are inconsistent with judicial duties and responsibilities [5 U.S.C. § 3105]; and

(7) prohibiting agencies from removing administrative law judges except after a hearing before the United States Merit Systems Protection Board (MSPB) and upon a showing of good cause [5 U.S.C. §§ 554 and 7521].

FALJC support of unified corps: The Conference supports the concept of an independent corps of Federal administrative law judges, in which the judges are entirely separate from the agencies whose cases they adjudicate. We believe that a unified corps will enhance the reality and public perception of fairness in the administrative judicial process, and at the same time make the Federal administrative judiciary more efficient and productive. Every state that has instituted an independent corps or "central panel" has experienced success with it, and we anticipate the same result on the Federal level. The Conference has gone on record before the Congress as supporting the corps. In a letter dated March 18, 1994, we advised the Subcommittee on Administrative Law and Governmental Regulations that "[first and foremost, the Conference continues to support the concept of legislation establishing an independent corps." That remains our position today.

FALJC suggestions to improve the bill: In the same letter, we stated that the Conference's Executive Committee had elected not to endorse S. 486 in its present form, which was passed by the Senate on November 19, 1993 and reintroduced in the current session under the same number. S. 486 is identical to what is now before you as H.R. 1802. Our position with respect to H.R. 1802 is thus the same as that taken with respect to S. 486: we believe that H.R. 1802 is flawed in certain key respects that actually detract from its intended purpose of assuring efficiency and judicial independence. Thus H.R. 1802 should be revised to address the concerns we have listed above.

We conclude by offering our continuing cooperation as the bill proceeds through mark-up, and by reaffirming our commitment to this committee's efforts. As I said at the outset, the work is important, and will result in better government for our citizens.

Mr. GEKAS. All right, next we'll hear from Judge Nash.

STATEMENT OF HON. ELI NASH, JR., PRESIDENT, THE FORUM OF UNITED STATES ADMINISTRATIVE LAW JUDGES

Judge NASH. Thank you, Mr. Chairman and members of the subcommittee. I am Eli Nash, Jr., president of the United States Forum of Administrative Law Judges. With me is Judge Bruce Birchman, who is our legislative chairman.

We thank you again for the opportunity to testify here before you today. And, as you are aware, Forum has provided the subcommittee with information regarding testimony and comments submitted by forum, the Congress, and Federal agencies on this and other important matters.

The forum is opposed to enactment of H.R. 1802 for the reasons set forth in our statement, which we request that the subcommittee include in the record of this hearing.

Mr. GEKAS. Without objection, it will be so included.

Judge NASH. OK.

Our principal concerns include the following:

The proposed new corps agency is unnecessary.

Secondly, the proposed corps agency will inject politics into the decisions of the ALJ's and impair its decisional independence and frustrate the purposes of the Administrative Procedure Act.

Next, under the proposed corps, agencies will lose control of policy implementation and program expertise, and there will be inefficiencies and delays in the adjudicatory review process.

Next, the corps will be costly, inefficient, and will increase the Federal deficit.

Next, the agencies have serious concerns similar to those which have been expressed by the forum. .

The Administrative Procedure Act of 1946 provides an impartial and fair judicial process administered by judicially—by

decisionally-independent administrative law judges. There is no documented evidence of any widespread abuse of decisional independence of judges by the more than 31 agencies who employ them today.

As shown in appendix A to my testimony, there are 1,363 administrative law judges, 1,094 employed at Social Security and 309 at 30 other Federal agencies. In the past the problem relating to adjudication of Social Security disability claims has led people to think or to believe that a corps would help to solve some of the problems that go along with the Social Security program.

During 1994, Congress enacted the Social Security Administrative Reform Act of 1994 and the Social Security Administration was established as an independent agency to assure adjudicatory fairness and impartiality. If any further reforms are needed, such reforms should be tailored to specific problems which do not require the creation of a corps agency, as we see today.

Secondly, the new corps agency would be administered by politically appointed judges, a Chief Judge and eight politically appointed division Chief Judges, all of which need not have served as judges. These political appointees would establish policy applicable to all judges, assign and reassign judges to eight broad subject matter divisions, establish uniform rules of procedures, and initiate secret disciplinary proceedings. These powers harbor the potential for substantial abuse and will politicize the administrative law judge judicial process. They will create an environment in which pressure can be put on judges to decide cases in certain ways and will diminish the decisional independence of the administrative judiciary.

A fundamental premise of the Administrative Procedure Act is that expertise is essential to prompt for informed decisionmaking. The assignment/reassignment of judges to broad subject matter divisions under H.R. 1802 will transform those expert judges into generalists. The administrative process will become more time-consuming, more expensive to administer, less efficient, and a burden upon reviewing courts is likely to increase. Agencies will be unable to determine the number of judges that need to be assigned to their cases and to tailor their rules of procedures to individual agency missions. As a result, agencies will lose control of their dockets and their ability to effectively implement and enforce statutory requirements.

A new corps is not needed to achieve the approximately $9 million in claimed savings that this will accomplish. Those savings could be realized now if the Social Security Administration determined that it was appropriate to eliminate 10 of its regional offices which administer the field offices of the ALJ's.

Finally, Federal agencies do have serious concerns similar to those expressed by forum. A unified corps will impede timely and efficient administration, increase cost, reduce the consistency and accuracy of judges' decision because of the dilution of judicial expertise, disrupt agency policy implementation and mission, and exacerbate judicial review of agency decisions. For these reasons, forum urges that H.R. 1902 not be enacted, and we would be happy to answer any questions.

[The prepared statement of Judge Nash follows:]

PREPARED STATEMENT OF HON. ELI NASH, JR., PRESIDENT, THE FORUM OF UNITED STATES ADMINISTRATIVE LAW JUDGES

INTRODUCTION

Mr. Chairman and members of the Subcommittee. My name is Judge Eli Nash. I am the President of The Forum of United States Administrative Law Judges (Forum). I want to thank you for this opportunity to state Forum's concerns with regard to H.R. 1802, The Reorganization of the Federal Judiciary Act.

Forum is a voluntary professional organization of administrative law judges that has a strong interest in improving the administrative judicial process.

H.R. 1802 would establish a new unified corps agency to which all cases authorized to be heard before an Administrative Law Judge (ALJ) would be required to be referred for adjudication. All current 1,363 ALJs and future ALJs would be appointed to the new corps agency. The 1,363 current ALJs would be physically removed from the 31 agencies to which they have been appointed under the Administrative Procedure Act (APA) and transferred to the new corps agency.

The new corps agency would be located in Washington. D.C. in a new building that would provide office space for administrative personnel and office, hearing, research, and storage facilities for at least the current 309 ALJs at 31 federal agencies in Washington, D.C. The new corps agency also would have to provide appropriate field office and hearing facilities for the 1,363 ALJs (including 1,094 Social Security Administration (SSA) ALJs at more than 100 field offices).

The new corps agency would be governed by a politically appointed Chief Judge and eight politically appointed Division Chief Judges, all of whom would need only be "learned in the Law" and need not have served as ALJs. The politically appointed Chief Judge and the eight politically appointed Division Chief Judges would constitute the Council of the Corps (Council). The Council would be authorized to transfer or assign ALJs to one of eight broad subject matter divisions, to reassign judges from one division to another for the adjudication of cases, and to initiate discipline proceedings to remove an ALJ for misconduct or neglect. The disciplinary proceedings would be held in secret and there would be no public record of them. If the accused ALJ does not accept the disciplinary determination, he/she could appeal to the MSPB and obtain an on the record hearing. This is in marked contrast to the existing APA disciplinary process in which hearings on the record before the Merit Systems Protection Board (MSPB) can be commenced by complaining agencies, which must establish good cause to remove or otherwise discipline an ALJ.

Forum is opposed to the enactment of H.R. 1802. Creation of the proposed corps of ALJs will be inimical to the fair and efficient functioning of administrative proceedings for several reasons.

The proposed corps will inject politics into the decisions of ALJs, impair decisional independence, and frustrate the purposes of the APA.

Under the proposed corps, agencies will lose control of policy implementation.

The proposed corps will be costly, inefficient, and will increase the federal deficit.

In the past, problems relating to adjudication of Social Security disability claims led many persons to believe that a corps of ALJs would solve those problems. ALJs at the SSA comprise more than 80, or 1,094 of the 1,363 ALJs. Approximately 309 non-SSA ALJs are appointees at 30 federal agencies.) *See Appendix A.*

On August 4, 1994 Congress enacted the Social Security Administrative Reform Act of 1994. This legislation established the SSA as an independent agency to ensure adjudicatory fairness and impartiality. The President signed the legislation into law on August 15, 1994.

Subsequently, on September 9, 1994, the Social Security Administration adopted rules for "Disability Process Redesign." The rules were designed to "ensure dramatic improvements in the way the entire [disability] process works and is managed to serve the American Public." *See generally* SSA Pub. No. 01–002 at 2.

In light of these measures, further reform of the administrative judiciary appears unnecessary at this time.

We note that on March 18, 1994 the Federal Administrative Law Judges Conference (FALJC), an organization of ALJs that was a principal supporter of earlier and similar legislation to establish an ALJ corps, advised the Subcommittee that it

"elected not to endorse the existing provisions of S. 486"[1] and "took no action on H.R. 2586."[2]

We also note that the National Conference of Administrative Law Judges of the American Bar Association (NCALJ) has expressed concerns, which we share, that the corps bill legislation needs to address.[3] H.R. 1802 does not address those serious concerns.

I. THE PROPOSED CORPS WILL INJECT POLITICS INTO THE DECISIONS OF ADMINISTRATIVE LAW JUDGES, IMPAIR DECISIONAL INDEPENDENCE AND FRUSTRATE THE PURPOSES OF THE ADMINISTRATIVE PROCEDURE ACT

H.R. 1802 would drastically alter the APA. The APA for almost 50 years has ensured a fair and impartial agency decisional process and provided guarantees of the decisional independence of the administrative law judiciary.[4] Decisional independence of ALJs under the APA means freedom to find facts, freedom to make a decision based on the judge's best assessment of the record in light of agency policy, and freedom to render decisions without fear of retaliation or discrimination in any form because of the decision reached.

These freedoms are statutorily recognized in the APA, which applies to the vast majority of cases heard by administrative law judges.

As the Supreme Court observed in *Ramspeck* v. *Federal Trial Examiners Conference,* 345 U.S. 128, 142 (1953), the APA was designed to remedy the infirmities in obtaining a fair and impartial hearing that existed prior to the 1946 enactment of the APA: "Many complaints were voiced against the actions of the hearing examiners, it being charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations." *Id.* at 130. The APA should not be changed unless there are legitimate and sufficient reasons for doing so.

As noted, 1,363 ALJs serve at 31 agencies to which they were appointed based upon merit selection under the APA and regulations of the United States Office of Personnel Management (OPM).

The proposed corps, governed by a political hierarchy, will put political pressure on ALJs to decide cases in certain ways, will diminish the decisional independence of the administrative law judiciary, and therefore will frustrate one of the key goals of the APA.

The FALJC committee report referenced earlier noted that the proposed corps structure would "overjudicialize the administrative hearing process, and vest too

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[1] S. 486 in the 103d Congress is identical to S. 486 as reintroduced on March 2, 1995 and H.R. 1802.

[1] In its April 29, 1992 testimony before the predecessor of this subcommittee, FALJC testified that it wanted to delay enactment of the pending H.R. 3910 and S. 826 corps bills until it could develop a consensus among its members on the best way to structure the corps. The FALJC committee report that led to this change in position noted that "the bills as now drafted have provoked objections by various agencies and by concerned members of FALJC that the Corps structure would diminish ALJ expertise, improperly restrict Presidential appointment powers, attenuate agency caseloads, over-judicialize the administrative hearing process, and vest too much control over the process in overly aggrandized ALJs who would be self-perpetuating." On January 6, 1992, the National Conference of Administrative Law Judges of the American Bar Association advised FALJC that it had similar reservations.

[3] By a letter dated January 6, 1992 NCALJ advised FALJC, "appropriate legislative language must be included to unified corps legislation to address and resolve those concerns" which included *loss of ALJ Positions, loss of specialized expertise or Specific agency expertise, loss of agency control of policy Implementation,* and establishment of *a Chief Judge bureaucracy* with no provision for appropriate protections of individual ALJs from improper administrative oversight and management *affording even less decisional and functional independence than under the Present APA system.* (Emphasis added.)

[4] 5 U.S.C. § 1104(a) (2) requires the appointment based on merit of ALJs from a register maintained by OPM following successful completion of a rigorous competitive examination conducted by OPM. The examination score and order of listing on the ALJ register reflects review by OPM of a lengthy application that must demonstrate at least 7 years of administrative law experience and review of professional references, a written examination, and an oral examination before a panel is chaired by an OPM representative and includes an ALJ and attorney representative of the American Bar Association. The APA provisions that ensure the decisional independence of ALJS and a fair, impartial, and objective agency decisions include 5 U.S.C. § 4302(2)(D) and 5 U.S.C. § 5372 which exempt the pay of ALJs from agency performance recommendations and ratings prescribed for other civil servants; 5 U.S.C. § 3105 which requires that agency rulemakings and hearing are assigned to ALJs in rotation as far as practical; 5 U.S.C. § 554 which requires that ALJ decisions are made after an on-the-record hearing; 5 U.S.C. §§ 551, 555, and 557(d) which bar *ex parte* communications with ALJs; and 5 U.S.C. § 7521 which prohibits agencies from removing ALJs except after a hearing before the Merit Systems Protection Board and upon a showing of good cause.

much control over the process in overly aggrandized ALJs who would be self perpetuating." This is especially true under H.R. 1802, which would authorize political administrators—"persons learned in the law"—to appoint judges, assign judges to divisions, reassign judges, initiate complaints to discipline judges, and refer such complaints to a special panel for secret disciplinary hearings.

In 1988, concerned groups testifying on the S. 1275 corps bill expressed alarm that it would politicize the administrative law judicial process. The NAACP testified that "this new federal bureaucracy will politicize a procedure which must be both independent and impartial . . . the heart of the flaw is the political appointment for chief judge, section 583, and division chief judge, section 584, and the unchecked power of the Council in section 585."

Under H.R. 1802, the Chief Judge and eight Division Chief Judges are likely to be "politically correct" because of the distinct possibility that a lack of political correctness will result in their not being reappointed at the end of their fixed term appointments.[5]

Collectively, the described powers conferred on the Chief Judge and the Council of eight Division Chief Judges to assign and reassign judges and initiate secret disciplinary proceedings harbor the potential for substantial abuse. They may prevent the more than 1,300 judges from exercising their rights under the Whistleblower Protection Act, which is designed to remedy agency fraud, waste, mismanagement, and abuse.

The disciplinary powers of the Chief Judge and the Council of Division Chief Judges stand in marked contrast to the APA requirements of 5 U.S.C. section 7521, the Civil Service Reform Act of 1978, and long-standing regulations. Under the current APA regulatory process, the MSPB is the only agency authorized to hear agency initiated complaint cases on the record and to remove or otherwise discipline judges upon a showing of good cause by the complaining agency for such reasons as but not limited to misconduct, neglect, incompetence, or because they are no longer needed. We note, too, that secret judicial disciplinary proceedings are contrary to the trend in more than a majority of States which require public hearings and public records.

There is no need for changes of the magnitude proposed by H.R. 1802. Significantly, there have been very few problems in the entire 48-year history of the federal administrative law judiciary. The few problems that have arisen have been resolved expediently without the radical surgery proposed in H.R. 1802.

For example, proponents of the proposed corps claim that there have been infringements of judicial decisional independence, particularly among SSA ALJs. In 1984 a federal district court condemned certain practices of the SSA. The federal district court, however, dismissed the complaint because the SSA had ceased those practices. *Heckler* v. *Association of Admin. Law Judges,* 594 F. Supp. 1132 (D.D.C. 1984).

The only other judicial action to consider an alleged infringement of the decisional independence of SSA ALJs occurred in 1989. The Court of Appeals in *Nash* v. *Bowen (Nash),* 869 F.2d 675 (2d. Cir.), *cert. denied,* 110 S. Ct. 59 (1989) found those allegations without merit and dismissed the complaint.[6]

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[5] H.R. 1802 also diminishes merit appointments of ALJs under the APA by permitting these non-ALJ Chief Judge and Division Chief Judge political appointees to remain as ALJs in the event that they are not reappointed as Chief Judge and Division Chief Judges upon the expiration of their original term appointments.

[6] In particular, the Court held that "The efforts complained of in this case for promoting quality and efficiency do not infringe upon ALJs' decisional independence. Since Judge Elfvin [the district court judge] concluded that the 'Peer Review Program' was intended to be, and operated as, a quality control measure, we see no reason to disturb his determination." *Nash,* 869 F.2d at 680. The Court also held that, "Regarding the Secretary's policy of setting a minimum number of dispositions an ALJ must decide in a month, we agree with the district court that reasonable efforts to increase the production levels of ALJs are not an infringement of decisional independence. * * * The setting of reasonable production goals, as opposed to fixed quotas, is not in itself a violation of the APA. The district court explicitly found that the numbers at issue constituted reasonable goals as opposed to unreasonable quotas. * * * Moreover, in view of the significant backlog of cases, it was not unreasonable to expect ALJs to perform at minimally acceptable levels of efficiency. Simple fairness to claimants awaiting benefits required no less." [*Id.* at 680–81.]

With regard to the Secretary's reversal rate policy, the Court concluded that, "The bottom line in this case is that it was entirely within the Secretary's discretion to adopt reasonable administrative measures in order to improve the decisionmaking process. Since the district court found no direct pressure on ALJs to maintain a fixed percentage of reversals, we conclude that the Secretary's policy in this regard did not infringe upon the decisional independence of ALJs." [*Id.* at 681 (Citations omitted).]

As noted, during 1994 the Congress established the SSA as an independent agency in order to ensure adjudicatory fairness and impartiality. In these circumstances, it is premature to adopt radical measures designed to meet the same Congressional objectives.

The APA continues to serve the nation well as a bulwark for an impartial and fair judicial process administered by decision ally independent judicial officers. If there were any real widespread abuse of the decisional independence of the administrative law judiciary by the agencies, the attorneys who practice before the agencies would be the first to document these abuses before the Congress.

In the event that the Subcommittee believes that evolutionary amendments to the APA are appropriate, Forum suggests that any necessary remedial legislation be narrowly tailored to address such limited and specific problems. The legislation enacted last year by the Congress that created an independent SSA, for example, is aimed at eliminating alleged appearances of impropriety and ensuring fair and impartial Social Security determinations.

II. UNDER THE PROPOSED CORPS, AGENCIES WILL LOSE CONTROL OF POLICY IMPLEMENTATION

The proposed corps would seriously undermine the crucially important aspects of administrative adjudication—expertise, flexibility, and accountability—and would create many new inefficiencies and delays in the adjudication process.

The proposed corps will interfere with the agencies' ability to perform their missions because it will result in a loss of expertise and hamper the implementation of agency policy.

The entire premise of administrative adjudication is that hearing and initial decisions should be handled by experts. One example of this is 8 U.S.C. section 274B of the Immigration and Nationality Act, which requires that "Hearings on complaints under this subsection shall be considered before administrative law judges who are specially designated by the Attorney General as having special training respecting employment discrimination and, to the extent practicable, *before such judges who only consider cases under this section.*" 8 U.S.C. § 274B (1988) (emphasis added). In enacting the Mine Safety Act of 1969, Congress recognized the special qualifications of the ALJs who hear mine safety cases by transferring the ALJs en masse from the Department of the Interior to the new Federal Mine Safety and Health Review Commission at the time it was created.

The kinds of cases that many ALJs hear, such as the multiparty complex litigation common at the Environmental Protection Agency, Federal Energy Regulatory Commission (FERC), and the United States International Trade Commission, involve some of the most technical or specialized areas of the law. A fundamental premise of the APA is that expertise is essential to prompt and informed decision making. Transforming expert ALJs into generalists would increase the burden upon administrative reviewers and upon generalist judges in reviewing courts by increasing the likelihood of inadequate hearing records and unhelpful or erroneous initial decisions.

Many of the agencies that employ ALJs traditionally have preferred judges with considerable experience in the agency's legal specialty to hear and decide that agency's specialized cases. This valuable expertise, over time, will be lost if H.R. 1802 is approved.

H.R. 1802 will result in ALJs no longer having a full opportunity to use their expertise. Five of the eight divisions of the proposed unified corps are a mixed bag of unrelated diverse specialized areas of the laws.[7] For example, Division 1, the Division of Communications, Public Utility, and Transportation Regulation, apparently will include judges from the FERC, the Federal Maritime Commission, the National Transportation Safety Board (NTSB), and the Office of the Secretary of Transportation. The organic statutes administered by each of the agencies to which these groups of judges are assigned are wholly different from one another. FERC cases typically involve complex multi-party general rate increases; enforcement cases are adjudicated by judges with the Office of the Secretary of Transportation; and railroad safety investigations are the order of the day before the NTSB. In these circumstances, ALJs will no longer have a full opportunity to use their expertise. The administrative process will become more time-consuming, more expensive to administer, and less efficient.

[7] The divisions also are unwieldy. For example, Division 5 apparently would consist exclusively of almost 1,094 SSA ALJs. Division 8, by contrast, apparently would consist exclusively of only 2 ALJs who hear banking cases for the Office of Thrift Supervision. Each of these divisions would be supervised by a politically appointed Division Chief Judge.

The management imbalance and the loss of expertise just discussed will diminish the ability of agencies to meet their missions.

As noted, the Chief Judge and Council of the proposed corps would have full authority to assign and reassign more than 1,300 judges that currently preside at 31 agencies to the eight divisions of the proposed corps. These political appointees also will have the authority to hire additional judges from the register of judges administered by the OPM and assign them to a particular division.

By comparison, under the present APA system, the agency head or designee controls the agency's case docket. In accord with the anticipated caseload, the agencies appoint ALJs from the OPM's register of ALJs that have completed the competitive ALJ examination. The agencies also prescribe rules of procedure tailored to the types of cases that each agency is required to decide.

If agencies cannot determine the number of ALJs needed to be assigned to their cases and tailor rules of procedure to their individual agency missions, the agencies will lose a significant part of their ability to efficiently implement and enforce the statutes for which they are responsible.

In addition, H.R. 1802 divests agency heads of their existing administrative authority over ALJs and requires the new corps agency to develop uniform procedural rules. These measures will cause agencies to lose control over their own dockets or cases. The timing and priority of cases often reflect important agency policies and goals. This is particularly true at agencies that rely heavily on adjudication, rather than rulemaking, for the articulation of agency policy. The changes proposed under H.R. 1802 would be especially detrimental to cases involving issues of administrative policies, safety concerns, and time sensitive matters.

The new corps agency will be subject to severe budgetary limitations. Under section 6 of H.R. 1802, the budget of the new corps agency is limited to amounts that do not exceed in any fiscal year the total amount expended by all agencies in fiscal year 1995 in performing all of its functions. These budgetary constraints are quite severe. They are likely to delay adjudications, increase agency backlogs, decrease agency efficiency, and disrupt agency missions, many of which are related to health and safety.

III. THE CORPS PROPOSED BY H.R. 1802 WILL BE COSTLY, INEFFICIENT, AND WILL INCREASE THE FEDERAL DEFICIT

The proposed corps will incur multi-million dollar annual expenditures over and above that of the long-standing APA system.

Much of the "savings" said to be realized from the creation of the new corps agency will not be realized because the savings would be derived from changes in the SSA process which could be done now by SSA and could be achieved without regard to the creation of the new corps agency. Approximately $9 million dollars in claimed "savings" is said to result from the elimination of 10 regional offices maintained by the SSA. If appropriate, the SSA could eliminate those regional offices now. Creation of a corps is not needed to produce such "savings."

The proposed corps agency will incur the following additional costs to the nation's taxpayers:

the cost of necessary library facilities[8] and source materials that presently are provided through agency libraries that support the agencies' total missions;
the cost of a central corps building in Washington, D.C.;
the cost of personnel department support;
the cost of training; and
the cost of substantial additional hearing rooms and other facilities.

The proposed central corps building in Washington, D.C. will have to provide hearing room facilities for more than 300 judges presently in agencies in Washington, D.C.

The proposed central corps building also will have to provide hearing room facilities for the other agencies in Washington, D.C. that do not have judges and need judges to hear their cases.

The new corps agency will have to pay the 31 agencies in which the judges currently reside, and any other agencies in Washington, D.C. that subsequently develop a long-term need for judges on a continuing basis, for the cost of the agencies' hearing facilities, for the cost of facilities to store evidence at the agencies, and for facili-

[8]The new and additional cost to the proposed corps of library facilities at the central corps building in Washington, D.C. is likely to total millions of dollars in start-up costs and substantial annual expenses for materials and support staff to serve the needs of more than 300 judges currently at 31 agencies at Washington, D.C. A large central library that approaches the scale of the main library of the United States Department of Justice at Washington, D.C. would be required. 16

ties needed by ALJs to reside during recesses and settlement negotiations. Under H.R. 1802, many if not all of the more than 300 ALJs presently employed by 31 federal agencies at Washington, D.C. would remain at those federal agencies until such time as a new central corps building with appropriate courtrooms and library facilities was provided in order to integrate those judges into the corps agency and physically remove those judges from the 31 federal agencies in which they are located.

The proposed corps will incur costs to provide service and facilities for more than 1,194 judges that will remain assigned to more than 140 field offices—1,094 in SSA and approximately 100 judges at the Department of the Interior, the Department of Labor, the National Labor Relations Board, the occupational Safety and Health Review Commission, the Federal Mine Safety and Health Review Commission, the Food and Drug Administration, and the Coast Guard. In this respect, the proposed corps either will have to set up its own field offices or pay the agencies for use of their field offices for these 1,150 judges, who will remain assigned to field offices.

In addition, the agencies from which all existing 1,363 judges will be removed (1,094 SSA judges and 309 non-SSA judges) will need to maintain existing services whether the ALJs use them or not. This is especially true to the extent that the phased physical removal of the judges is delayed by the new corps agency. Thus, the cost of administrative proceedings and the true net cost of the proposed corps will not diminish, and most certainly, will increase the cost of adjudication to the nation's taxpayers.

In short, while some existing duplication might be eliminated by gathering all ALJs into a single agency, many economies currently realized through the sharing of facilities and support services (e.g. libraries, case files, and personnel services) by ALJs and their employing agencies would be lost. Duplication of each agency's specialized subject-matter library, duplication of case records, and greater travel time for agency staff counsel would result.

Proponents of H.R. 1802 contend that establishment of a corps will result in increased efficiency and flexibility in the assignment of judges to cases because current programs under which ALJs are loaned from one agency to another are not successful. It also has been said that the proposed corps would enable the adjustment of case assignments to better correlate with the various peaks and valleys of individual agency caseloads.

The facts belie these claims. Agencies must justify every loan request to the OPM and the Office of Management and Budget. The loan program pays for itself. The agency that borrows a judge is responsible for reimbursing the lending agency for all the expenses incurred by the latter in consequence of the loan. The loan program also works well and is efficient. On July 18, 1995, John Flannery, Director of the OPM Office of Administrative Law Judges, indicated that "[t]the Administrative Law Judge Interagency Loan Program has continued to operate effectively during Fiscal Year 1995. We are not aware of any problems or issues with the program." See *Appendix B* for Mr. Flannery's comments.

Forum's testimony before this Subcommittee in 1992 on the H.R. 3410 corps bill proposal, which we request be incorporated by reference, included a similar comment from OPM. OPM then noted that the loan program worked well and was administratively efficient. In this respect too, the proposed corps does not maximize efficiency.

H.R. 1802 expressly provides for the new corps agency to provide assistance to federal courts at the Court's request. However, such assistance is already available under the APA. Federal courts have appointed ALJs as special masters in appropriate cases. H.R. 1802 does not contain any change in the jurisdiction of ALJs that would permit them to perform additional judicial functions in the federal courts. H.R. 1802 merely provides for the continuation of what can be done at present. Consequently, it is absurd to contend that a corps is needed in order to assist the federal courts.

Proponents of a corps suggest that the central panels of ALJs used in some states are an example of the kinds of efficiencies that would be obtained by the new corps agency. There are central panels in 16 states and New York City. See *Appendix C*.

The comparison is not justified. Unlike the federal system and the guarantees of judicial decisional independence provided by the APA, many of these central panels do not guarantee the decisional independence of state ALJs.

Unlike federal ALJs under the APA,

many central panels do not appoint judges based on merit selection;

many central panel judges do not have the decisional independence from agency advocates conferred by the APA on federal ALJs;

many central panel judges are not insulated from agency determination of pay and can be disciplined and removed without the due process guarantees provided under the APA; and

many central panel judges do not possess the high standards of professional qualification held by federal ALJs.

In general, the central panels in the states also are not comparable to the federal administrative law judiciary in cohesiveness. The central panels often do not live up to their name. They often do not embrace all of those within the state who perform ALJ functions.

IV. AGENCY CONCERNS

The federal agencies have opposed prior similar corps bill proposals because of the disruptive effect of the proposed legislation on the ability of the federal agencies to carry out their missions. For example, during the last session of the Congress, the Secretary of Health & Human Resources (HHS), the Secretary of Labor (Labor), the Department of Transportation (DOT), the National Labor Relations Board (NLRB), the Federal Labor Relations Authority (FLRA), the Occupational Health & Safety Review Commission (OSHRC), and the Federal Mine Safety and Health Review Commission (Mine Safety) expressed several serious concerns in opposition to S. 486 that are similar to concerns expressed above by Forum. Their letters, which appeared in the November 19, 1993 *Congressional Record* at pages S. 16566 through S. 16571, and the FERC's letter of October 13, 1993 are provided in *Appendix D.*

The following excerpts from those letters reflect the agency's serious concerns—

HHS Secretary Shalala stated, "the bill would impede efficient administration, increase costs, and reduce the consistency and accuracy of ALJ decisions." Of particular concern to her agency, which includes 1,094 of the 1,363 ALJs, was that there would be a "loss of program expertise," that "there would be new bureaucratic barriers—the corps and the corps council—impeding the direct and immediate flow of policy information from SSA to the ALJS," that "[p]rocessing times would increase under the bill because of the cumbersome and time consuming transfer of cases from SSA to the ALJ corps for decision and the transfer of cases back to SSA for review and revision or effectuation, as well as the additional transfer of cases remanded by the courts," and that "[a]countability to the Congress and the public for administrative decision making would be diffused as case processing would be split between the corps and the agencies."

Labor Secretary Reich stated that the corps bill would result in a "critical loss of expertise in the decision making process." He noted, "ALJs with little or no experience with the Department would be hearing DOL cases, and former ALJS of the Department would be hearing cases of other Federal agencies for which they have no particular expertise," and that "the expertise of the ALJs in the Division will be further diluted because, in all likelihood, they will be spreading their attention more thinly among cases brought under a variety of statutes." Secretary Reich also stated, "The establishment of uniform rules of procedure] could unsettle many years of program precedent, and would require a substantial expenditure of government time and resources by the Council, by the program agencies, and by persons practicing before the agency." He concluded, "it is imperative that administrative law judges continue to function effective and efficiently in areas well known to them if the public interest is to be served."

The DOT stated that any administrative efficiencies of the corps "are outweighed by the detrimental effects of the bill, namely: dilution of expertise available to the agency, disruption of agency practice, and loss of agency control over resources required for its functions." DOT noted, "to pool judges under general 'Communications, Public Utility, and Transportation Regulation' or 'Safety and Environmental' law divisions would deprive DOT of those persons who possess detailed knowledge of our programs and unique missions."

The NLRB stated, "judges with little or no experience with the NLRA could be hearing NLRB cases, and former NLRB judges could be hearing many cases for which they have no particular expertise. The non-expert judges . . . would undoubtedly take more time to write decisions, thus increasing delays, and because of their inexperience create additional difficulty for attorneys appearing before them and especially for the Board in its review of their decisions." The NLRB further noted that "the United States Courts of appeals, which often give deference to Board 'expertise' would be less likely to do so if the judges rendering the initial decisions were generalists."

The NLRB noted, "The substitution of an entirely new set or procedural rules general enough to cover all administrative proceedings can only serve to create many issues regarding their implementation, interpretation, and application. The result,

of course, will be to unsettle areas now well settled in practice before the Board." The NLRB was "also opposed to a loss of control over its own caseload. Under the bill, the NLRB could not be assured of having unfair labor practices heard in a timely manner; that lack of control can only exacerbate delay in the issuing of Board decisions."

The FLRA noted that the bill would create a Division of Labor "responsible for all private and Federal sector labor law cases, that *'although the Federal sector labor-management relations Program was modeled after the National Labor Relations Act. there are significant differences between the two labor programs,'* that "at the FLRA Judges are confronted with issues such as a union's right to be represented at 'formal discussions' and, through the ULP [unfair labor process) the enforcement of arbitration awards and orders from the Federal Service Impasses Panel." FLRA stated, "Creating a Division of Labor within the Corps, while appearing to create a specialty, will fail to adequately insure that Federal employees' disputes are heard by ALJs competent in the filed of Federal labor law. Over the years, the expertise acquired by ALJs at the FLRA has proven extremely beneficial for the efficient and timely resolution of unfair labor practice cases in the Federal sector. With the creation of the Corps, our cases could be referred to judges with little or no experience in the Federal labor laws, in turn delaying the issuance of decisions. The bill provides no assurance that our cases will be reviewed by those judges expert in Federal labor law." The FLRA also stated, "With no power to expedite our cases over another agency's cases which the council may wish to prioritize, our cases could be delayed unnecessarily." (Emphasis added.)

OSHRC stated, "Certain areas of occupational safety and health law, particularly health regulations, present complex technical problems. Litigants who now come before OSHRC depend on ALJs who are highly knowledgeable in their field to ensure fair hearings. Similarly, the Commissioners themselves rely on seasoned ALJs to create adequate hearing records for cases that are appealed. . . . the expertise of individuals in that division of the corps will be diluted from what it is now, simply by virtue of the fact that they will be required to spread their attention more thinly among cases brought under a variety of acts. Through no fault of their own, either the judges will generate decisions of lower quality or the decisional process will be slowed. Lower quality decisions result in more cases on appeal. Both consequences work to the detriment of the litigants (most often the employer and the government) and, ultimately, of the employees whom the Act seeks to protect."

OSHRC also stated, "Regressing to a standard set of rules would only exacerbate litigation, increase the number of cases and the time required for disposition, and drive up the very costs we have sought to control."

Mine Safety stated, "An administrative law judge corps would . . . run the risk of reducing operator compliance with federal mine safety requirements." Mine Safety noted, "Review of a judge's decision by the Commission is not a matter of right but of discretion and the grounds for such review are circumscribed by the Mine Act. The statutory deference accorded to trial decisions in mine safety and health cases makes sense only in the context in which it was enacted, where the judges who hear and decide those cases in the first instances are experts. . . . Commission review and judicial review in the U.S. Courts of Appeals, provided in the Mine Act, rely on expert ALJ development of the hearing record." Mine Safety also noted, "Enactment of S. 486 would adversely affect the fairness and the efficiency with which cases are being heard and decided. The result would be delays in adjudication, which Congress sought to avoid in the Mine Act."

FERC stated, "The fundamental problem with the bill is that the . . . Commission would lose access to its cadre of highly experienced and effective administrative law judges. . . . The broad subject-matter divisions in the proposed corps do not help. The proposed Division of Communications, Public Utilities, and Transportation Regulation could result in a Coast Guard ALJ with knowledge and experience in admiralty matters deciding the eligibility and prudence of gas supply realignment costs under the commission's Order No. 636 natural gas pipeline industry restructuring rule. And the Commission has no assurance of even having its cases heard by ALJs from that broad division. The Council of the Corps would have the sole authority to assign ALJs to a division and to transfer or reassign ALJs from one division to another."

FERC also stated, "the Commission would lose control over its caseload. At present the Commission uses ALJs in a variety of ways in addition to their traditional function of serving as decision-maker after a formal evidentiary hearing. Commission ALJs act as a settlement judge and other neutrals in alternative dispute resolution procedures, conduct local hearing at the site of proposed hydroelectric facilities, preside over the development of a record for decision by the Commission itself, and act as special masters. Under the proposed legislation, all cases

authorized to be heard before an ALJ would be required to be referred to the Corps for adjudication on the record after opportunity for a hearing, even though the Commission might wish to use some other appropriate decision-making procedure."

FERC noted, "the Council of the Corps would have the authority to establish different procedural rules for the Commission's cases. Such a change in the Commission's long established and effective procedures would cause a significant disruption in the processing of the Commission's workload."

RECOMMENDATION AND CONCLUSION

Forum urges that H.R. 1802 not be enacted. In summary,

The proposed corps will inject politics into the decisions of administrative law judges, impair decisional independence, and frustrate the purposes of the Administrative Procedure Act.

Under the proposed corps, agencies will lose control of policy implementation.

The proposed corps will be costly, inefficient, and will increase the federal deficit.

Mr. GEKAS. We thank the gentleman.

We now note the presence of the gentleman from South Carolina, Mr. Inglis, a distinguished member of this subcommittee.

And we proceed to the testimony of Judge Cleveland.

STATEMENT OF HON. MELFORD O. CLEVELAND, PRESIDENT, ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC.

Judge CLEVELAND. Mr. Chairman and members of the committee, good morning. We have submitted a statement which I would appreciate being put in the record.

Mr. GEKAS. Without objection, it will be so received.

Judge CLEVELAND. I'm the president of the Association of Administrative Law Judges, Inc. This is the association of judges in Social Security. We have a membership of more than 600, and I'd like to put our membership list in the record, Mr. Chairman.

Mr. GEKAS. Without objection, it, too, will be received for the record.

[The list will be held in subcommittee files.]

Judge CLEVELAND. We wholeheartedly support the enactment of H.R. 1802, the corps bill, which is identical to S. 486.

As an aside, before I get into my statement, though, Mr. Chairman, I'd just like to say that I'm also a member of the Federal Administrative Law Judges Conference and a member of that executive committee. When this very bill came up for discussion in that group, there was an election in which the membership of FALJC voted 2-to-1 in favor of this very bill. The executive committee, however, chose to raise other reservations. I just wanted to clear that up.

The bill will save substantial money, as we have heard from the previous testimony. And Senator Hank Brown has absolutely put a limitation in the bill which will keep it from costing money. It will increase the efficiency of the decisionmaking process. The judges and the work can be brought together, Mr. Chairman. We know that there are some agencies that don't have a whole lot of work, and it's not the fault of the judges, but we can take the judges and the work and put them together. It would be fairer and will enhance due process of law.

I've been an administrative law judge since the early 1970's, and I can say, Mr. Chairman, without equivocation, that each new set of managers has tried to push us in some direction. In the 1980's,

the emphasis was to deny SSA cases, and I have cited in my statement the association case where all that is brought out.

I was one of those on Bellman Review, and I was afraid all the time that I would either violate the agency's, what amounted to, rule against paying cases or get in trouble with the Federal courts. Now, then, it seems that the emphasis is more on paying cases, and in that connection, Mr. Chairman, I would like to put into the record a letter which I recently wrote to the Commissioner of Social Security commenting on a proposed regulation which appeared to me set up a system for paying cases pretty well en masse. I'd like to put that into evidence.

Mr. GEKAS. Without objection, it, too, will be received for the record.

[The information follows:]

Melford O. Cleveland, President
Association of Administrative Law Judges, Inc.
Suite 407, 117 Gemini Circle
Birmingham, Alabama 35209-5861

May 12, 1995

Honorable Shirley S. Chater
Commissioner of Social Security
926 Altmeyer Building
6401 Security Boulevard
Baltimore, Maryland 21235 (By Fax (410) 966-2830)

Dear Commissioner Chater:

This letter constitutes my comment as President of the Association of Administrative Law Judges Inc., your ALJs in the Office of Hearings and Appeals, on the proposed amendments to 20 CFR parts 404 and 416, Administrative Review Process, Prehearing Proceedings and Decisions by Attorney Advisors, published April 14, 1995. We are making this comment pursuant to the invitation set out in the proposed amendments. We appreciate the opportunity to express our concerns about this matter which goes to the heart of our work.

We make this comment, with a feeling of futility and sadness. We have the feeling of futility, because for almost a year, this Association has tried continuously, by every means available to it, to express our Judges' reservations and anxieties about this matter. As far as we can tell, these efforts have produced absolutely no results. We are sad, because this is true.

Our concerns are primarily as follows:

A. We believe that the proposed procedures are illegal. It is our view that once a Request for Hearing is filed, the case must be decided by an ALJ who is appointed pursuant to, and proceeds in accordance with the Administrative Procedures Act. However, under this proposal, cases will be decided after a request for hearing is filed, by a staff attorney on his or her own, or on recommendation of a paralegal; neither of whom is appointed pursuant to or is subject to the provisions the Administrative Procedures Act.

B. We believe that the proposed procedures are impractical and won't work. Many of the resources which the staff attorneys will use will be taken from the ALJs, and we have seen no concrete plan to fully replace these resources. Therefore, whatever gain in production of cases is made by the staff attorneys may be lost by the ALJs whose resources have been stripped away.

C. We believe that since these staff attorneys and paralegals will be hired to only PAY cases, and since they are inexperienced and will also have the natural tendency to please their employers who hired them to PAY cases, many cases will be paid that should not be paid. In our view this will result in the improper depletion of the following funds:

1. The Disability Trust Fund will be depleted by whatever amount is required to fund the improperly paid Title II disability cases.

2. The Medicare Fund will also be improperly depleted. Each person who is awarded Title II disability benefits is eligible for Medicare 24 months after the onset of disability. Therefore those who are improperly awarded disability benefits will also improperly deplete the Medicare fund.

3. General Funds of the United States Treasury will be improperly depleted because Title 16 SSI claims are paid from general funds. Therefore, each such claim that is paid that should not be paid will improperly deplete these funds.

4. The Medicaid Fund will also be improperly depleted because each SSI claimant that is awarded benefits is eligible for Medicaid at once. Therefore each SSI claim that is paid which should not be paid will improperly deplete the Medicaid Fund.

In summary, we believe that for the foregoing reasons the proposal is illegal, won't work, and will improperly drain large sums of money from all of the funds discussed above. I am personally convinced that this is true based on my 42 years of government service, 25 years of which has been as an SSA ALJ. Moreover high officials in OHA and SSA who have discussed the matter with us off the record have also expressed grave doubts about the proposal. We, and some of them, are firmly of the opinion that the resources that are going into this project could be better utilized by the ALJs.

We regret that more time was not allowed for comment. We were unable to hear from all our Judges because the proposed regulation did not reach many of the field libraries until about two weeks before the May 15 deadline. Moreover, I suggest with the greatest respect, that since our counsel in this matter, which vitally affects our own work, has been ignored, perhaps you would reconsider your position and endorse the Heflin Bill, S. 486, which would allow us to transfer to a separate corps of ALJs.

cc: Mr. Fisher
Mr. Skoler
Judge Rucker
Judge Anglada
Judge Watkins

With kindest personal regards, I am
Respectfully,
Melford O. Cleveland
Melford O. Cleveland

Judge CLEVELAND. What is essential, Mr. Chairman, is that the rule of law be followed in each case without the threat of improper influence. This principle is basic and fundamental to any fair judicial system. H.R. 1802 will accomplish this. The administrative law judges and their decisions are the bulwark against the erosion of the rule of law. It is the enforcement of the rule of law, Mr. Chairman, which prevents agencies from running rampant without making changes in the law or regulations.

It is said, Mr. Chairman, that all of these problems are confined to Social Security. This is incorrect. I have set out a statement from the American Medical Association which they began making at least in 1988, in which they questioned the fact that administrative law judges are employees of the agency and they cite particularly the Federal Trade Commission.

With the chairman's permission, I'll put this AMA letter, and an earlier one to the same effect into the record.

Mr. GEKAS. You're loading this record, Judge.

[Laughter.]

Mr. GEKAS. But that's all right. We appreciate it.

Judge CLEVELAND. Mr. Chairman, I'm almost through.

Mr. GEKAS. Without objection, it will be received for an additional spot in the record.

[The information follows:]

American Medical Association
Physicians dedicated to the health of America

James S. Todd, MD
Executive Vice President

515 North State Street
Chicago, Illinois 60610

312 464-5000
312 464-4184 Fax

April 20, 1992

The Honorable Barney Frank
Chairman
Subcommittee on Administrative Law
and Governmental Relations
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

RE: H.R. 3910, "Administrative Law Judge Corps Act"

Dear Chairman Frank:

The American Medical Association is writing to express support for H.R. 3910 the "Adminstrative Law Judge Corps Act." We request that this letter be included in the record of the April 29, 1992 hearing of the Subcommittee on Administrative Law and Governmental Relations concerning H.R. 3910.

H.R. 3910 would create an independent "Adminstrative Law Judge Corps" consisting of all administrative law judges (ALJs) currently employed by the federal government. This free-standing corps of ALJs would preside at administrative hearings, including hearings arising out of Medicare claims and other actions.

The AMA has been concerned that the independence and objectivity of administrative law judges are increasingly being questioned. Of particular concern is that under existing law, an ALJ is an employee of the particular agency and thus cannot be perceived as a truly independent judge. For example, hearing examiners employed by the Federal Trade Commission (FTC) decide cases in which the FTC has issued a complaint. In addition, in recent years, concerns have been raised that quota systems are used by agencies to measure the performance of ALJs and thereby influence the number of decisions favorable or unfavorable to the agency.

By establishing an independent ALJ corps, H.R. 3910 would ensure that administrative decisions are made in an atmosphere free from department or agency bias and from even the appearance of such bias. The result should be more equitable administrative decisions and greater public confidence in those decisions.

We urge your Committee to act promptly in favorably reporting this bill.

Sincerely,

AMERICAN MEDICAL ASSOCIATION
535 NORTH DEARBORN STREET • CHICAGO, ILLINOIS 60610 • PHONE (312) 645-5000 • TWX 910-221-0300

JAMES H. SAMMONS, M.D.
Executive Vice President
(645-4300)

March 21, 1988

The Honorable Barney Frank
Chairman
Subcommittee on Administrative Law
and Governmental Relations
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Re: H.R. 2726, "Administrative Law Judge Corps Act"

Dear Chairman Frank:

The American Medical Association is writing to express support for H.R. 2726, the "Administrative Law Judge Corps Act." We request that this letter be included in the record of the March 17, 1988 hearing of the Subcommittee on Administrative Law and Governmental Relations concerning H.R. 2726.

H.R. 2726 would create an independent "Administrative Law Judge Corps" consisting of all administrative law judges (ALJs) currently employed by the federal government. This free-standing corps of ALJs would preside at administrative hearings, including hearings arising out of Medicare claims and other actions.

The AMA has been concerned that the independence and objectivity of administrative law judges are increasingly being questioned. Of particular concern is that under existing law, an ALJ is an employee of the particular agency and thus cannot be perceived as a truly independent judge. For example, hearing examiners employed by the Federal Trade Commission (FTC) decide cases in which the FTC has issued a complaint. In addition, in recent years, allegations have been made that quota systems are used by agencies to measure the performance of ALJs and thereby influence the number of decisions favorable or unfavorable to the agency.

By establishing an independent ALJ corps, H.R. 2726 would ensure that administrative decisions are made in an atmosphere free from department or agency bias and from even the appearance of such bias. The result should be more equitable administrative decisions and greater public confidence in those decisions. The HHS proposal for ALJs to handle Medicare appeals by telephone emphasizes the need for an independent ALJ corps.

We urge your Committee to act promptly in favorably reporting this bill.

Sincerely,

James H. Sammons, M.D.

Judge CLEVELAND. More recently, the Department of Interior had a Chief Judge that the managers didn't like. What they did was get together and reorganize the administrative law judge section of the Department of Interior and organize out the position of Chief Judge. So they put him out without a hearing, without even any charges being brought against him.

The enactment of H.R. 1802 would cure all of these problems in a very fine way. We've been over all of this, and I cite in my statement the sections of law which make it very clear that agency policy and prerogatives are protected.

The taxpayers will also be served by the enactment of this law because cases will neither be paid or denied en masse, Mr. Chairman, but the meritorious claims will be paid under the law and regulations, and the nonmeritorious ones will be denied.

On page 5 of my statement I discuss some of the objections that have been raised by some of the judges who are opposed to a corps bill. I won't go into that, Mr. Chairman, except to say that we are convinced that many of these objections refer to the fact that some judges merely want to keep the happy situation that they have.

Mr. Chairman, on July 1, counting my military service, I completed 43 years of Federal Government service. Twenty-five years has been as an SSA ALJ. Therefore, what this Congress does with this bill will have very little effect on me, but I've given a good part of my life to the system and I want to see it improved.

Just as the House recognized that consolidation and separation from the agencies was desirable for the Board of Contract Appeals when you enacted H.R. 1530 on June 15, I believe the House will recognize that such consolidation and separation is desirable for administrative law judges and pass this bill. The Senate, of course, passed it unanimously in the last Congress.

Mr. Chairman, it's my considered judgment, after all I've seen and experienced, that if the corps bill is enacted into law, we will have the greatest system of its kind in the world. In my opinion, if the bill is not enacted, there are dark days ahead for administrative law and justice in America.

H.R. 1802 should be enacted because it will make the whole system less expensive, more efficient, and fairer to the litigants and the American taxpayer.

Thank you, sir.

[The prepared statement of Judge Cleveland follows:]

PREPARED STATEMENT OF HON. MELFORD O. CLEVELAND, PRESIDENT, ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC.

Mr. Chairman and Members of the Committee, good morning, I am Melford Cleveland, President of the Association of Administrative Law Judges, Inc.—the organization representing ALJs in the Social Security Administration. My resume is attached to my statement.

Our organization has a membership of more than 600 members out of approximately 1000 ALJs in SSA. We are presenting a list of our members to this Committee.

We wholeheartedly support of the enactment of H.R. 1802, the Corps Bill, (identical to S. 486) into law for the following reasons:

I. IT WILL SAVE SUBSTANTIAL MONEY

It will eliminate duplication, and provide opportunities for economies of scale. The Congressional Budge Office calculates that, taking into account the start up costs,

the Corps Bill will save over 20 million dollars a year—in five years or less. Moreover, we know it will not cost extra money, because the amendment by Senator Hank Brown of Colorado limits the authorization for appropriations for this function to be the same as in the current fiscal year.

II. It Will Increase the Efficiency of the Decision Making Process

It will bring the Judges and the work together. No longer will there be Judges who are not busy in one area, while those with excess work are in another.

III. It Will Be Fairer and Will Enhance Due Process of Law, Both for the Litigants and for the American Taxpayers Who Ultimately Pay the Bills

The conflicts between managers and ALJs at Social Security are well known. I can say without equivocation, that beginning in 1970, when I became an ALJ, each new set of agency managers has sought, without a change in the law or very little in the regulations, to exert some pressure on the Judges.

In the 1980's the emphasis was to *deny* SSA cases. Improper pressures of all kinds were brought to bear on the ALJs. See: *Association of Administrative Law Judges* v. *Heckler*, 594 F. Supp. 1132 (D.C. D.C. 1984). I was one of those on "Bellman Review" because the agency said that I paid too many cases, and I could hardly get a pay case approved. Now the emphasis seems to be on *paying* cases, and it is much more difficult to deny a case.

In that connection, I ask permission to put into the record, a copy of a letter which I, as President of our Association, recently wrote to the Commissioner of Social Security in regard to a regulation that was being considered. It is of concern, because it provides a framework for *payment* of SSA disability cases, en masse.

What is essential is that the rule of law be followed in each case without the threat of improper influence. This principle is basic and fundamental to any fair judicial system. H. R. 1802 will accomplish this. The Administrative Law Judges and their decisions are the bulwark against the erosion of the rule of law. It is their enforcement of the rule of law which prevents agencies from running rampant without making changes in the law or regulations.

It is said by a few ALJs, who, in my opinion would oppose a Corps Bill on any ground in the world, that such problems or conflicts between ALJs and Agency managers and the impermissible Agency pressures on ALJs are confined to the Social Security Administration. The record makes it clear that this is not true. These kinds of problems have been experienced at different Agencies at different times. For example, over the years, the American Medical Association has questioned the fact that Administrative Law Judges are employees of the particular Agency, citing the Federal Trade Commission as an example. An excerpt from one of the AMA's more recent letters follows:

> The AMA has been concerned that the independence and objectivity of administrative law judges are increasingly being questioned. Of particular concern is that under existing law, an ALJ is an employee of the particular agency and thus cannot be perceived as a truly independent judge. For example, hearing examiners employed by the Federal Trade Commission (FTC) decide cases in which the FTC has issued a complaint. In addition, in recent years, concerns have been raised that quota systems are used by agencies to measure the performance of ALJs and thereby influence the number of decisions favorable or unfavorable to the agency.
>
> By establishing an independent ALJ corps, H.R. 3910 would ensure that administrative decisions are made in an atmosphere free from department or agency bias and from even the appearance of such bias. The result should be more equitable administrative decisions and greater public confidence in those decisions.

Letter dated April 20, 1992, to the Honorable Barney Frank from the American Medical Association. Because of these concerns, the AMA has favored the enactment of a Corps Bill for many years. Mr. Chairman, may I add to the record this complete letter, and an earlier one taking generally the same position?

More recently, the Department of the Interior had a Chief ALJ who made decisions and took actions that some managers in the Department of the Interior did not like. The managers "reorganized" the ALJ office in the Department of Interior and abolished the position of the Chief ALJ. Thus, the Chief ALJ whom the managers did not like was out, without any hearing or even any charges being brought against him. Moreover, the law books are filled with cases, wherein the litigants complain that ALJs are employees of the very agencies that are opposing the litigants.

The enactment of H.R. 1802 would cure all of these problems in a very fine way, because H.R. 1802 also provides, in Senator Cohen's amendment, an orderly and fair method for the discipline, and in some instances, removal of an ALJ. H.R. 1802 also provides in Section 599d (f) that it "shall effect no change in—(1) an agency's rulemaking, interpretative, or policymaking authority in carrying out the statutory responsibilities vested in the agency or agency head; (2) the adjudicatory authority of administrative law judges; or (3) the authority of an agency to review decisions of administrative law judges under any applicable provision of law." Thus, under H.R. 1802 we will have decisions based upon the rule of law and Agency regulations, without the threat of impermissible pressures such as the rewarding or sanctioning of a judge by an Agency.

The taxpayers will also be served, because cases won't be paid or denied en masse, but will be considered on an individual basis, with mentorious claims being paid and non meritorious ones, denied.

IV. The Statements by Opponents of the Corps Bill Are Invalid

There is a small group of ALJs who call themselves Forum that oppose the corps bill. (I know four ALJs who said they were members of this group.) This group, however large or small has argued from time to time that under the Corps Bill, expertise will be lost. This is incorrect, there is a provision for Divisions of ALJs, according to their expertise, in the Corps Bill. Moreover some of the best legal scholars in both Houses of Congress have worked this problem out to their satisfaction and conclude that expertise will not be lost by the enactment of the Corps Bill.

Critics have also contended that the appointments of the Chief Judge and the Division Chief Judges will inject politics into the system. This is not a valid concern, because the President of the United States appoints all federal judges, and the system works well. Moreover, the Department of Justice required this provision because, among other matters, of Constitutional considerations.

Finally, some opponents have at times set up a total straw man, without any basis in fact, arguing that the Corps Bill will be more costly than the current system. The Congressional Budget Office has answered this concern. Nobody, except these opponents have suggested that a great library and offices will be required. H.R. 1802 merely provides for ALJs to transfer to a separate Corps, and no fees charged by agencies for ALJs will be lost. See: Section 10 of H.R. 1802.

I have attended several Congressional hearings on the Corps Bill. The same few ALJs have always come up with arguments in opposition to it. Some insight may be had into their attitude from the following story: After one hearing in which an ALJ witness had made some obviously specious arguments against the Corps Bill, I asked one of the opposition ALJs why they took the Committee's time with such worthless arguments. The reply to me was that *they just wanted to keep what they had.*

In the past some federal agencies have also opposed the Corps Bill. Historically, state agencies that have been faced with the consolidation of state ALJs into a judge corps have also opposed such a move, but once the system is in place, they approve of it.

The only thing that the Agencies would lose by the Corps Bill is the ability to exert impermissible pressure on the ALJs.

V. Conclusion

Mr. Chairman, on July 1, counting my military service, I completed 43 years of Federal Government service. Twenty-five years of that has been as a Social Security ALJ. Therefore, what this Congress does with this Bill will have no personal effect on me. However, I have given a good part of my professional life to the ALJ system, and I want to see it improved. Just as the House recognized that consolidation and separation from the Agencies was desirable for the Boards of Contract Appeal, [see H.R. 1670 merged with H.R. 1530, passed by the House on June 15th, 1995]; I believe that the House will recognize that such consolidation and separation is desirable for ALJs and pass this Bill. The Senate took this action in the last Congress by passing an identical Corps Bill by unanimous consent.

Mr. Chairman, it is my considered judgment, after all I have seen and experienced, that if the Corps Bill is enacted into law, we will have the greatest system of its kind in the world. In my opinion if the Bill is not enacted, there are dark days ahead for administrative law and justice in America. H.R. 1802 should be enacted, because it will make the whole system less expensive, more efficient, and fairer to the litigants and to the American taxpayer.

Mr. Gekas. Thank you very much, Judge Cleveland.

The Chair will now yield itself the customary 5 minutes to pose some questions to the panel.

Judge Cleveland, I remember you made a reference to Senator Brown's insistence that the issue remain revenue-neutral at least—and that was a key feature that drew additional Senate support, is that not so?

Judge CLEVELAND. Yes, sir.

Mr. GEKAS. In the previous Congress?

Judge CLEVELAND. Yes, sir.

Mr. GEKAS. Now we have incorporated that in this bill today. So it means that that issue is moot; is that your judgment?

Judge CLEVELAND. Yes, sir.

Mr. GEKAS. That's why you mentioned it?

Judge CLEVELAND. Yes.

Mr. GEKAS. And, further, no longer is it revenue-neutral, but we have testimony in the record that it actually will save money in the long run.

Judge CLEVELAND. Every year, yes, sir.

Mr. GEKAS. And that's an important additional feature to try to convince Members of Congress in this day of budget restraints of the efficacy of this legislation.

Judge Nash, I'm a little disappointed in some of the testimony, naturally, because——

Judge NASH. Of course.

Mr. GEKAS [continuing]. I—yes, because I want to tell you that the basic reasoning that prompted my involvement in this legislation from the start was a chance to remove politics from the system at hand. We have a President who politically appoints a Cabinet official, who politically appoints a bureau head, who is politically connected with the administrative law judge, as I viewed it. So we turned this around, in my judgment, in this legislation, so that that political line ends, and then an independent corps takes up the duty of finishing off a citizen's complaint against the Government. And you state, and it's now on the record, which I hope to refute, that this injects politics where you feel logically no politics exists.

Judge NASH. Congressman, may I respond?

Mr. GEKAS. Certainly, because I'm worried about that.

Judge NASH. I can say with Mr. Cleveland that I have almost 40 years in the Federal Government and almost 20 years as an administrative law judge. This issue has been alive for almost somewhat 10 years. I have never seen an issue over which more politics became involved in whether or not a particular judge could speak out about whether he wanted the corps bill or whether this was good or not. And this is one of the problems—this is one of the reasons that we're here today. It has become a very political issue, and it will continue to be a political issue if the bill is passed with political individuals in these positions. There is a lot of animus, I might say, out there about positions taken on the corps bill, and I don't see how you can get the politics out of it.

Mr. GEKAS. I might have to call you on the telephone——

Judge NASH. Again.

Mr. GEKAS [continuing]. So we can debate this further.

[Laughter.]

Mr. GEKAS But I really—I want to stress that my motivation is to remove politics or to attempt——

Judge NASH. Well, we only——

Mr. GEKAS. Insofar as any conference of independent judges or any corps of independent judges, as we favored over the years, will be replicated by the passage of this bill, I believe to that extent it removes politics.

Judge NASH. Mr. Chairman, mine is only an observation. If you think it won't be politicized, then I might well agree with you.

Mr. GEKAS. One other question I have, and that's for Judge Moore. Do you imply in your testimony that we would lose the power of congressional oversight if we passed this bill? I thought you said that if the administrative cap or the appropriations caps remain in place that you implied that we lose the power of congressional oversight. Did you mean to say that or to——

Judge MOORE. I did not. Our primary objection is to an appropriations cap that might not allow us enough flexibility to meet the needs of the litigants before us.

Mr. GEKAS. And wouldn't that problem, if it arose, be subjected to congressional review, so that we could correct that if it became a flaw?

Judge MOORE. And if that is so, then our objection is removed.

Mr. GEKAS. And on that note, we'll end my questioning of this panel—before my time is expired. Wait, I've got to think of another question.

Mr. REED. Go ahead, Mr. Chairman.

Mr. GEKAS. No, no, no, that's fine.

[Laughter.]

Mr. GEKAS. We turn to the gentleman from Rhode Island, Mr. Reed.

Mr. REED. Thank you, Mr. Chairman.

Let me raise again the issue of the political implications of the bill. I believe the chairman has, in fact, responded to the present situation, which is very political. We would all, I think, admit that. You have a Cabinet Secretary who, through budget policies, through implicit and explicit signals, does that. So I think you are probably responding to the present political situation.

I'm not quite sure this fixes it entirely, and the reason I alluded to my previous questioning is that I think that the one thing that ensures the insulation of our Federal judges from political influence is their lifetime tenure, and we're not at all talking about lifetime tenure here. We're talking about in terms of 5-year terms for the Chief Judge and 5-year terms for division heads, and also the possibility of bringing people from outside the spectrum of sitting administrative law judges.

I don't have a great solution, but I think this is an advancement, I think; I don't think we're quite there yet.

Mr. GEKAS. So you should rely on my decision.

[Laughter.]

Mr. REED. Well, let me—let us seek together an answer, Mr. Chairman.

Mr. GEKAS. Yes, we'll do that.

Mr. REED. But, again, more of a comment, I think, than a question, but I do think we have to be concerned about setting up a sys-

tem which unwittingly, I think, down the road could be staffed by people with a political agenda, who would now have the ability to move people around and assign cases. I think we'd regret that. But, again, I think this is an attempt to deal with the issue very constructively and upfront, and I just don't think we're quite there yet.

Let me just raise another series of questions to the panel or open up a topic. If you look at the distribution of administrative law judges, the vast majority are Social Security Administration judges. I've got numbers from 1993, where there are 858 Social Security judges versus 5 in the Department of Agriculture, 5—4 or 5 in the SEC, and 5 in OTS, Thrift Supervision. And there's a presumption that this corps of judges is going to be allocating judges more efficiently, but if you look at these numbers, it's going to mean either one thing: either you're going to take judges from the Social Security Administration and put them in these other divisions or you're going to take these other judges and put them in the Social Security Administration because, I mean, it's just this big, big thing, and then there's a bunch of little, relatively small-sized ALJ's around.

And this all is feeding off the presumption, too—and I think Judge Cleveland mentioned this—that there are lots of ALJ's or some ALJ's sitting around with nothing to do. So, point one, Judge Cleveland, where are these underutilized ALJ's at the moment? And if that's the case, I presume you would ask them to come to Social Security and help you?

Judge CLEVELAND. Congressman, I'd like to get out of Washington alive.

[Laughter.]

Judge CLEVELAND. I can furnish you some figures, if you'd like for me to——

Mr. REED. Yes.

Judge CLEVELAND [continuing]. But I would like to get out of Washington alive. It's a long way to Alabama, and they're all around.

[Laughter.]

Judge CLEVELAND But let me say, first of all, sir, that the bill also provides for cross-training, so that, presumably—and I have tried NLRB cases, unfair labor practice cases——

Mr. REED. Right.

Judge CLEVELAND [continuing]. And with cross-training, it seems to me that a judge wouldn't necessarily just have to do cases for one agency. He could do two or three different kinds of work, and they could be shifted around.

And, also, sir, it is a fact, if I may brag on my own corps just a little bit, we have a wealth, a reservoir of experience in the Social Security ALJ's. They've come from everywhere. I was from the Department of Justice. Some of my colleagues were from General Counsel's office all over the place. Some of them were very able practitioners. And all that's a matter of record. We have records on that.

And I believe that with any sort of fair-minded administration this thing could be handled very well. We get, for instance, out-of-town judges flying in from Washington on occasion to Birmingham

to do cases that, if I couldn't do, Congressman, I ought to be retired on mental disability.

Mr. REED. Right.

Judge CLEVELAND. And maybe I should [laughter], but I that's the kind of thing I mean.

So I think with cross-training and the reservoir that we have, it can work out very well. It doesn't work out so well right now.

Mr. REED. Judge Moore, Judge Nash, do you have comments?

Judge NASH. With respect to judges not having work, there is an OPM program now in place that uses judges just that way. If agencies don't have work, they can tell OPM or OPM questions with respect to whether they have judges who aren't busy at the time and they will be assigned. And that program has been effective for some time.

Mr. REED. I notice my time has expired. Just I wonder if—to the chairman, that it seems to me that our deliberations might be helped if there's any type of information about backlogs and the inefficiency of the current system. Counsel might have that already, but if that's not available, then that information would be helpful to us because I think we're all proceeding on some anecdotal notions about, you know, we've got more people sitting here in the Energy Department that don't have anything to do, and then we've got Social Security judges who have a tremendously high caseload.

Judge CLEVELAND. Could I make one comment, Mr. Chairman?

Mr. GEKAS. Yes, Judge Cleveland.

Mr. REED. Yes.

Judge CLEVELAND. I would just say that, from our point of view, the current system of judge loaning is cumbersome and difficult because you have appropriations from different agencies, and we don't think it works very well.

Mr. REED. Thank you very much.

Judge MOORE. And, Congressman Reed, may I also comment that 599(a) of the proposed bill does require that the ALJ, on the date of commencement of the corps, be assigned to an area of specialization in which the judge has served. So the bill does address that to some extent.

And I would ditto the remarks of Judge Cleveland that the current process of loaning judges is cumbersome and awkward. That's our personal experience.

Mr. REED. Thank you very much. Thank you, Mr. Chairman.

Mr. GEKAS. We noted that Judge Cleveland has entered a list of the members of his group into the record, and we ask Judge Moore and Judge Nash if they'd be so kind as to furnish us lists for our consideration of their respective memberships. These lists will be held in our subcommittee files.

Judge MOORE. I do have a membership list with me and——

Mr. GEKAS. All right, then, we will accept that.

Judge MOORE [continuing]. I would proffer it into the record, along with a letter of Judge Pope appointing me his delegate for today's hearing.

Mr. GEKAS. Oh, very good. That's makes you official.

Judge MOORE. Yes.

Mr. GEKAS. This brings to a close the—Judge Nash.

Judge NASH. Let me make a statement for the record with respect to our membership list. I can only tell you that we represent judges in 15 of the 30 agencies. Certain of our judges have asked not to be identified for fear of retaliation for belonging to the forum. So I'm not at liberty to disclose——

Mr. GEKAS. If you want us to launch an investigation into any intimidation, I'd be happy to do so.

[Laughter.]

Mr. GEKAS. Seriously. I'm serious about that. That gripes me when I hear——

Judge NASH. Well, we'll let you—well——

Mr. GEKAS. If any one of them wants to come to me personally and give me an anecdote on which——

Judge NASH. Well, I'll give you an anecdote from myself, I mean as a member of forum from long ago.

Mr. GEKAS. Well, we'll talk about it, and if it leads to it, we will launch an investigation on intimidation.

But, in any event, I want to thank the panel for its participation. I want to thank the audience for not resorting to riot and demonstration during the course of the hearing.

[Laughter.]

Mr. GEKAS. And we will close it with a thanks to all. The subcommittee is adjourned.

[Whereupon, at 11:40 a.m., the subcommittee adjourned.]

APPENDIX 1.—LETTER DATED AUGUST 9, 1995, TO REPRESENTATIVE JACK REED, FROM SHIRLEY ANN JACKSON, CHAIRMAN, NUCLEAR REGULATORY COMMISSION

CHAIRMAN

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

August 9, 1995

The Honorable Jack Reed
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Congressman Reed:

I am responding to your request for the comments of the Nuclear Regulatory Commission ("Commission") on H.R. 1802, the "Reorganization of the Federal Administrative Judiciary Act." As you know, the bill would create an independent Administrative Law Judges Corps, whose members would conduct the formal, administrative adjudications for the Federal agencies.

We do not believe that the bill, as currently drafted, would have a major impact on the NRC, although it could have a significant, adverse impact if it were altered or interpreted as superseding or limiting the Commission's use of Atomic Safety and Licensing Boards (ASLBs). As expressly authorized in Section 191 of the Atomic Energy Act of 1954, as amended, the Commission uses such boards, usually comprised of one lawyer member and two technical members from a panel of qualified administrative judges designated by the Commission, to conduct the agency's adjudications concerning nuclear power plants and other commercial uses of nuclear energy. This statutory adjudicatory structure helps ensure sound and full exploration of the many technical and scientific questions relating to nuclear energy in our licensing cases. Thus, the ASLBs have played an important role in the Commission's fulfillment of its public health and safety mission. Were the Commission required to use only administrative law judges for its formal adjudications, it could no longer utilize the experienced, highly-qualified technical members of the ASLBs since they are not lawyers.

The Commission assumes that H.R. 1802 is not intended to abolish or limit its use of ASLBs and the technical expertise of its administrative judges since it does not repeal or amend section 191 of the Atomic Energy Act. However, this intent would be clearer if H.R. 1802 contained an explicit exclusion of cases adjudicated before the ASLBs (similar to Section 9 of the bill exempting boards established under the Contracts Disputes Act). Therefore, the Commission favors addition of the following provision to H.R. 1802:

> Nothing in this Act or the amendments made by this Act shall be deemed to affect any agency board established pursuant to the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et. seq.), as amended, or any other person designated to resolve claims or disputes pursuant to such Act.

We also note that a provision in the bill would authorize the Corps to prescribe rules of practice and procedure, without the concurrence of the agency, commencing two years following the effective date of the new law. Because of their broad applicability, the Commission is concerned that these rules might not include certain of the agency's long-standing rules of procedure which have been tailored to satisfy the agency's needs in adjudicating specific statutory licensing requirements. Since other agencies may have similar concerns, the Commission recommends that the legislation be amended so as to afford greater recognition to special agency procedural rules.

Sincerely,

Shirley Ann Jackson

cc: The Hon. George W. Gekas, Chairman

APPENDIX 2.—STATEMENT OF JAMES HILL, OFFICE OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION, AND PRESIDENT, CHAPTER 224, NATIONAL TREASURY EMPLOYEES UNION

My name is James A. Hill. I am employed by the Office of Hearings and Appeals (OH A) of the Social Security Administration (SSA) as an Attorney-Advisor. I am also the President of National Treasury Employees Union (NTEU) Chapter 224 which represents Attorney-Advisors in 96 Hearing Offices across the United States. Attorney Advisors in the Office of Hearings and Appeals work closely with the Agency's Administrative Law Judges in a number of capacities including as an advisor and decision drafter. Recently, Attorney Advisors have become independent decision makers in their own right serving along side the Agency's ALJs in that respect. I wish to thank the Subcommittee for inviting me to testify regarding the H.R. 1802, the Reorganization of the Federal Administrative Judiciary Act.

The National Treasury Employees Union supports the concept of an independent unified corps of federal administrative law judges but reluctantly concludes that the proposed legislation (H.R. 1802) is fatally flawed. The current administrative adjudicatory system has been in operation since 1946 and has maintained a reputation for integrity of the highest order. Administrative adjudications conducted under the tenets of the Administrative Procedures Act (APA) have provided a high level of public service. NTEU urges Congress to carefully consider all the effects of any substantial change in the administrative adjudicatory process. A significant change in the process should result in substantial improvement in the adjudicatory process, with the extent of improvement being defined by the degree that service to the public is enhanced. Change for mere change's sake should be regarded with extreme skepticism. NTEU urges Congress to carefully define the goals and standard of measure for attaining the goals of the administrative adjudicatory process, and then tailor legislation to achieve those goals. While H.R. 1802 will provide ALJs some measure of increased independence from agency influence, it does not address other concerns that are essential to the success of the federal administrative adjudicatory process.

One purpose of the APA was to permit the trier of fact to render decisions without undue influence by the governmental body and without fear of retaliation or discrimination precipitated by the Agency's reaction to the decision reached. While documented instances of blatant interference with the ability of the Administrative Law Judge to render "independent" decisions is remarkably rare, the threat of such interference remains a threat to the credibility of the process. The most graphic and dramatic attempt by an agency to so influence the decision making of its Administrative Law Judges was no doubt the infamous "Bellman Review" imposed by the Social Security Administration upon its ALJs in the early 1980's which was defeated by vigorous opposition led by SSA's own ALJs. However, it is unlikely that such blatant attempts are the primary threat to the judicial independence of ALJs. Far more subtle and less obvious methods of coercion have in some instances effectively limited decisional independence. The subtle nature of such pressures, e.g., assignment of staff and office space, render it virtually impossible to prevent such abuse as long as the Agency maintains a significant degree of control over the ALJ workplace. Finally, a perception of impropriety engendered by the fact that the ALJ is an employee of the Agency, though it is without merit, damages the integrity of the entire process.

The creation of an independent, unified corps of federal administrative law judges will provide an effective buffer between the agency and the adjudicator that will free the adjudicator from both the fact and the appearance of undue interference by the agency. HR 1802 will provide that buffer. However, H.R. 1802 fails to accomplish or ignores other goals that are essential if the administrative adjudicative process is to serve the public effectively.

Before establishing goals for the administrative adjudicatory process, it is instructive to consider the reasons the current system was implemented, and the primary objectives at the time of its creation. Simply stated, the APA was created to remedy impediments to obtaining a fair and impartial hearing of disputes between the government regulatory apparatus and the people. One approach to dealing with the need for impartial fact finding would entail the use of the Article III court system. However, for a variety of reasons, including lack of subject matter expertise of the courts and the formality of court proceedings, recourse to the court system was felt to be inefficient. Consequently, a system of administrative rather than judicial fact finding was established. The many and complex matters and controversies that arise in the enforcement of federal law and regulations requires the application of specific subject matter expertise and many of the efficiencies of the current system

result from the subject matter expertise of the trier of fact. The inherent efficiencies of the current administrative quasi-judicial process conducted by adjudicators with specific subject matter expertise as compared to a purely judicial process utilizing "generalist judges" have amply been demonstrated by the operation of the Administrative Procedures Act (APA) since 1946. Any attempt to limit or diminish the degree to which such subject matter expertise is brought to the process by the trier of fact is destructive of one of the chief benefits derived from the current system.

The creation of an independent, unified corps of federal administrative law judges need not interfere with the practice of bringing complex issues before an adjudicator with extensive subject matter expertise. Unfortunately, one of the chief effects of H.R. 1802 will be to reduce the importance of subject matter expertise in what NTEU believes is a misguided attempt to justify the existence of a unified corps. A Unified corps is justified based upon the fact that it can *better provide fair and impartial adjudicatory service to the public* without the reality or the appearance of undue agency influence or interference than can the current adjudicatory system.

However, as a matter of political expediency, H.R. 1802 is predicated on false assumptions regarding both the fiscal and operational efficiencies of an independent corps of generic (not expert) ALJs. A unified corps is unlikely to result in the economies of scale suggested by Section 2 of H.R. 1802 because over 75% of ALJs are currently employed by one agency, the Social Security Administration. Approximately 1100 of the approximately 1400 current Administrative Law Judges are employees of the Social Security Administration, which already operates the largest adjudicative system in the United States through its Office of Hearings and Appeals. In fact, during the last three years, OHA has increased its corps of Administrative Law Judges by approximately 300, the same number of current non-OHA ALJs. The scale of the OHA operation dwarfs the other ALJ organizations. Inclusion of all the non-SSA ALJs in OHA represents only an incremental increase in scale. However, a unified corps would present an opportunity for some savings. OHA maintains 132 hearing offices throughout the United States giving it facilities in nearly every major city in the country. ALJs presently employed by other agencies could certainly be assigned to the OHA sites permitting closure of some facilities and reducing travel and other related costs.

While a unified corps would not constitute a substantial increase in scale, the independent unified corps would lose the economy of scale of being an integral part of far larger governmental agencies. Even the largest adjudicatory body, the Office of Hearings and Appeals, constitutes less than 10% of its parent agency's personnel. In fact OHA relies quite extensively on SSA administrative and managerial support; providing that support independently would require a significant expenditure. It is conceivable that this expenditure would significantly offset any savings realized from potential closure of unnecessary offices both in the Washington area and the field and reduced travel and other related costs. The loss to the unified corps of benefits of the economies of scale of being associated with very large federal entities would likely be apparent in the area of information technology; these larger entities are far better able to absorb the costs associated with technological advancement than relatively smaller entities, especially when the smaller entities are on a "fixed budgets."

The most disturbing part of Section 2 is the notion that a unified corps would significantly increase productivity by eliminating operating inefficiencies introduced by "the dispersal of administrative law judges" resulting in the inability to direct ALJ assets to the area that has the most current demand. Much is being made of the dispersal of ALJs among 31 different federal agencies precluding the efficient assignment of ALJs to the agency that needs their services the most. However, the dispersal of ALJs is illusory. The following chart demonstrates the real lack of organization dispersion of the 1,363 ALJs on duty on July 18, 1995.

Agency	Number of ALJs
Social Security Administration	1,094
Department of Labor	68
National Labor Relations Board	66
Federal Energy Regulatory Commission	20
Occupational Safety and Health Review Commission	14
All of the remaining agencies that use ALJs	101
Total ALJs	1,363

Given the huge and still growing backlog of cases to be adjudicated by SSA ALJs, it is unlikely that significant human resource allocations can be made that will materially effect the overall work load efficiency of ALJs. Given the almost universal federal government downsizing initiatives completed or currently under way, it is unlikely that ALJ resources are being wasted to any significant degree.

Nonetheless, Section 2 of H.R. 1802 is troubling because of the emphasis placed upon assigning ALJs to hear cases outside of their areas of subject matter expertise. The disregard for the importance of subject matter expertise is directly contradictory to the fundamental premise upon which administrative adjudication is based: That adjudicators with subject matter expertise are better suited to decide complicated administrative disputes than are the generalist Article III courts. There may well be financial saving realized by collocating ALJs who hear cases from different agencies, but that does not necessarily mean that ALJs who are experts in one field of adjudication should be regularly utilized outside their areas of expertise. While NTEU recognizes the value of a comprehensive training program, expertise on the level required by ALJs results from education and experience, not training. Training can enhance education and experience, but it cannot replace it. As an aside, NTEU is all to well aware that the training budget is among the first targets for budget reduction.

No organization is more cognizant of the need to control the cost of government than NTEU.

Given the demographics of both the ALJ corps, the agencies' needs, and the public's needs, it is unlikely that substantial savings will result from the creation of a single independent agency. However, the primary concern in determining the benefit of a unified corps should not be cost alone, particularly when it does not appear that the existence of a unified corps will increase the cost of administrative adjudications.

H.R. 1802 proposes that substantial savings can be realized by using a local ALJ who does not have the detailed subject matter expertise rather than paying the travel costs of an ALJ who does possess that level of expertise. However, as any employee of the Social Security Administration knows all to well, there are two kinds of costs—administrative costs and program costs. The problem in reconciling these distinct areas of cost flows from the fact that SSA administrative costs tend to be measured in millions or tens of millions of dollars while program costs are measured in billions or tens of billions of dollars. The program costs associated with incorrect SSA disability allowances made by less than adequately prepared decision makers dwarfs any potential saving of administrative costs. NTEU strongly urges the Congress to ensure than administrative adjudications will continue to be conducted by those with the necessary subject matter expertise.

While NTEU applauds the creation of separate divisions recognizing the importance of specific subject matter expertise, it has serious reservations about the Council of the Corps being the Corps' policy making body. The divisions vary in size from the approximately 1100 ALJs in the Division of Health and Human Services to as few as 2 in the Division of Financial Services Institutions yet each division has one vote. Effective administration of the unified corps may well be crippled by the Division Chief Judges protecting their own divisions at the expense of the needs of other, larger, and under represented divisions.

Even more fundamentally, the organizational structure proposed in H.R. 1802 is more appropriate to an Article III court rather than a part of the Executive Branch. We already have an independent court system which comprises a coequal branch of our government; it makes little sense to create another such entity. The purpose of ALJs is to conduct administrative proceedings in order to assist the various federal agencies in accomplishing their missions. These adjudicatory proceedings are part of the regulatory or administrative function of federal agencies. While the Corps' ALJs should be free of undue influence from the various federal agencies regarding specific adjudications, it should not interfere with the agencies' role in the matter of policy formation and implementation in the areas where they have jurisdiction. H.R. 1802 substantially limits the ability of the agencies to effectively implement their policies and would introduce another element of delay and uncertainty to the public administration. NTEU believes that it is essential that the unified corps remain an integral part of the executive branch of the federal government and as such must be directly responsible to the President of the United States.

While Section 598 provides that all current Administrative Law Judges would be transferred to the Corps at the time of the commencement of the operation of the Corps, the status and disposition of the agency employees currently supporting ALJs is unclear. Section 599 b(d)(6)(A) provides that the Council of the Corps is authorized to, ". . . select, appoint, employ, and fix the compensation of the employees (other then administrative law judges) that the Council deems necessary to

carry out the functions, powers, and duties of the Corps." Section 599 c(c) provides in relevant part that, a ". . . judge or staff member of the Corps on the date of commencement of the operation of the Corps, and all new judges and staff members appointed by the Council, may not thereafter be involuntarily reassigned to a new permanent duty station. . . ." This certainly intimates that at the time of commencement of the Corps, staff (non-administrative law judges) will become employees of the Corps without being selected by the Council of the Corps (see Section 599 b(d)(6)(A)). These staff persons appear to be permanent employees of the Corps rather than employees "on loan" from the agencies. Section 5, Transition and Savings Provisions, provides in Section 5 (b) that with the consent of the agencies concerned, the Administrative Law Judge Corps may use the facilities and the services of officers, employees, and other personnel of agencies from which functions and duties are transferred to the Corps for so long as may be needed to facilitate the orderly transfer of the function and duties under this Act. It is not clear whether individual employees, or categories of employees (e.g. Attorney Advisors from the Office of Hearings and Appeals) would become permanent employees of the Corps or be "loaned employees." It is not clear that positions would continue to exist to which such "loaned" employees could return when the Corps no longer needs them. NTEU believes that those agency employees whose primary duties involve workload support of the ALJs, as distinguished from "staff positions" should become at their option, employees of the Corps at the time of commencement of the Corps. Section 5 (d) ("The transfer of personnel pursuant to subsection (b) or (c) shall be without reduction in pay or classification for 5 years after such transfer.") refers to the "loaned personnel" but apparently does not refer to the Corps' employees. NTEU believes that similar protection should be afforded to agency personnel who become Corps employees at the time of commencement of the Corps. Furthermore, NTEU believes that before an agency consents to transfer personnel pursuant to the provisions of Section 5 (b), that the matter be presented to any "partnership" arrangement that may exist between the agency and a union with bargaining unit members affected by the transfer as well as appropriate Labor-Management Negotiations as required by 5 U.S.C. Section 1706. NTEU suggests that Congress take such other measures as it deems necessary to protect non-administrative law judge Corps employees to the same extent that the administrative law judges are protected.

NTEU is very concerned about the fiscal viability of an independent corps established pursuant to H.R. 1802. Of particular concern is Section 6 Authorization of Appropriations which states in relevant part that appropriations for each fiscal year from 1996 through 2000 not exceed the total amount expended by all agencies in fiscal year 95 in performing all functions transferred under this Act and the amendment made by this Act. Aside from the obvious problems with arbitrarily limiting appropriations without reference to real world economic considerations (e.g. inflation, etc.) or workload factors, it is not clear than Section 6 includes the cost of many of the "support services" (e.g. payroll, personnel, legislative liaison, audit services, public relations, etc.) currently provided by the agencies that are a normal part of the "cost of doing business" for a federal governmental entity. The inevitable shortfall of funds will markedly decrease the capacity of the Corps to provide the level of service that will be demanded by the public and the federal agencies that the corps will serve. NTEU recommends that Section 6 be eliminated.

The overwhelming number of current ALJs work for the Social Security Administration; it makes little sense to form a unified Corps containing more than 1000 SSA ALJs unless SSA is bound to send appeals from its disability process to ALJs. The Conference Report on the Social Security Administrative Reform Act of 1994 (p. 98) states as follows: "Although not required by law, the agency follows the procedures of the Administrative Procedure Act (APA) with respect to the appointment of ALJs and the conduct of hearings." H.R. 1802 does not compel the Social Security Administration to continue to adjudicate its disability appeals through the unified corps.[1] Obviously, elimination of the SSA workload would substantially decrease the viability of an independent unified Corps and perhaps even render it superfluous. NTEU believes that either H.R. 1802 should be amended to assure that SSA cases will continue to be the province of ALJs or creation of the unified corps should be delayed until the disability crisis at SSA is resolved.

NTEU does not believe that H.R. 1802 in its present form mobilizes the assets necessary for dealing with the single largest crisis facing federal administrative adjudicatory process today, the Social Security Administration's disability backlog at the level of the ALJ hearing. Indeed, the inevitable disruption of process that will

[1] Given the magnitude of the problems which currently beset the SSA disability adjudicatory process, particularly at the appellate level, SSA could hardly be faulted for seeking alternatives to the current failed system.

occur during the transitional period as corps operations begin, will exacerbate the SSA crisis. A disruption as short as three months will add approximately another 120,000 cases to the nearly 600,000 currently pending. Even without such a disruption, there is little in H.R. 1802 that suggests significantly increased productivity regarding SSA cases. Little use earl be made of the non-SSA ALJs who, after all, must continue to dispose of the case load of the other agencies. Unless there currently is a massive underutilization of non–SSA ALJs, no appreciable assistance can come from that source. Clearly, with budgetary constraints being what they are and the severe limitations of Section 6 of H.R. 1802 which limits expenditures to current levels, hiring of additional ALJs is precluded.

Section 4. Agency Review Study and Report directs that not later than two years after formation of the Corps, a report be made to the President and Congress regarding, among other matters, recommendations for using staff more efficiently to decrease backlogs, especially in the area of Social Security disability cases. While H.R. 1802 recognizes both the need to reduce SSA disability backlogs and that better utilization of staff resources is the method with the highest likelihood of success, a wait of two years is unacceptable. The crisis is now, therefore the solution must be now.

In fact, any valid argument for creation of the unified corps must address the major problems currently facing administrative adjudications, including the SSA backlog. SSA has recently empowered its more experienced attorney advisors with the authority to make decisions which are fully favorable to the claimant and thereby avoid the time and expense of unnecessary ALJ hearings. These attorney advisors, already supremely knowledgeable in the legal and medical ramifications of the Social Security disability process, are currently acquiring adjudicative expertise. These individuals, acting in the capacity of magistrates, similar in function to the Judge-Magistrates of the United States district courts, would provide the mechanism by which the SSA backlog could finally be brought under control. NTEU recommends that H.R. 1802 be amended to create approximately 600 magistrate positions and to place the aforementioned attorney advisors in such magistrate positions as permanent employees of the Corps.

In conclusion, NTEU supports the concept of an independent, unified corps of Administrative Law Judges. Unfortunately, H.R. 1802 as presently constituted is fatally flawed and will not create a viable corps capable of dealing with current and future administrative adjudicatory workloads. NTEU stands ready to render any assistance necessary to improve H.R. 1802 so that the people of the United States can receive the level of effective administrative adjudicatory service to which they are entitled.

Appendix 3.—Statement of the International Association of Machinists and Aerospace Workers (AFL–CIO)

The International Association of Machinists and Aerospace Workers (IAM), welcomes this opportunity to voice our opposition to H.R. 1802, The Reorganization of the Federal Judiciary Act. The IAM consists of over half a million workers who are employed in a variety of industries including, manufacturing, woodworking, transportation, shipbuilding, automotive, defense, and aerospace. The IAM frequently appears before Administrative Law Judges for the purpose of asserting workers rights. Consequently, we have a vested interest in making sure that administrative adjudication serves to effectively enforce our labor laws. This is why we oppose H.R. 1802.

H.R. 1802 will result in weaker enforcement of labor laws like the National Labor Relations Act (NLRA), the Occupational Safety and Health Act (OSHA), and other essential laws which protect workers by reducing the number of judges who have expertise in the NLRA, OSHA, and so forth. This is no small matter. For example, agencies like the National Labor Relations Board enforce complex areas of the law. Cases involving interpretations over how the law should be applied to multi-faceted fact patterns involving discriminatory discharges, bad-faith bargaining, and secondary picketing are common for the Administrative Law Judges (ALJ's) who serve the National Labor Relations Board—the enforcement body for the NLRA.

H.R. 1802 would permit these types of cases—which call for a great degree of knowledge about labor relations and labor law—to be heard by judges who have virtually no working knowledge of the particular labor law in question. The effects of utilizing ALJ's who are not experienced to hear these cases are obvious. In addition to an increase in erroneous decisions and an increase in frustration of the parties, it will be inevitable that the length of time that it will take to issue decisions will be increased greatly. In the world of labor law and labor relations, any one of these things could be devasting.

The NLRB, itself, has opposed this proposal based upon these very same concerns As former NLRB Chair James M. Stephens stated:

> . . . as under the prior bills, judges with little or no experience with the NLRA could be hearing NLRA cases, and former NLRB judges could be hearing many cases for which they have no particular expertise. The non-expert judges . . . . come to us without any prior labor law experience. They would undoubtedly take more time to write decisions, thus increasing delays, and because of their inexperience create additional difficulty for attorneys appearing before them and especially for the Board in its review of their decisions. . . . In addition, the present Board judges would spend much of their time on non–Board work, using their time to learn new fields, and squandering the expertise they have developed.

While member Stevens was referring to the bill which was introduced last Congressional session, his critique is still accurate when applied to H.R. 1802.

Although we recognize that improvements could always be made to the current system that is now in place involving ALJ's, reducing the degree of expertise gained by the ALJ's in the field of labor law is not one of them. Unfortunately, this is precisely what H.R. 1802 would do. Accordingly, we urge you to reject H.R. 1802.

Thank you for considering our views.

APPENDIX 4.—STATEMENT OF BETTY ATKINSON, ON BEHALF OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 215

My name is Betty Atkinson. I am employed by the Office of Hearings and Appeals (OHA) of the Social Security Administration (SSA) as a Paralegal Specialist. I am the Executive Vice President of AFGE Council 215.

The American Federation of Government Employees (AFGE) represents approximately 45,000 SSA employees in offices across the United States. AFGE Council 215, the National Council of Social Security Administration, OHA Locals, represents approximately 4700 employees, including a professional unit composed of attorney advisors and physicians, located in OHA Headquarters, Falls Church, VA and hearing offices throughout the United States, with the exception of approximately 420 professional employees located in 96 hearing offices.

I appreciate the opportunity to testify before the Subcommittee regarding the "Reorganization of the Federal Administrative Judiciary Act" (H.R. 1802) and the establishment of an Administrative Law Judge (ALJ) Corps.

AFGE Council 215 opposes this bill because it will *not:* promote efficiency, increase productivity, reduce administrative functions, provide economies of scale, provide better public service and public trust in the administrative resolution of disputes.

Having read and heard the testimony presented on July 26, 1995, to the Subcommittee on Commercial and Administrative Law, of the House Judiciary Committee, AFGE Council 215 presents the following comments—in opposition to the bill—for consideration by the Subcommittee.

IS THIS TRULY A "COST SAVINGS BILL" TO THE TAXPAYERS?

Enactment of H.R. 1802 will *create* another Federal Agency at a time in which Congress proposes cutbacks in federal spending, reducing the number of federal employees in many agencies, decreasing budgets for salaries, equipment, awards, etc., and, in fact, the elimination of certain Federal Agencies.

Senator Howell Heflin in his testimony before the Subcommittee stated that there are "now more Administrative Law Judges than all U. S. District and Court of Appeals Judges." H.R. 1802 proposes to bring together all federal administrative law judges into a new federal agency known as the Administrative Law Judge (ALJ) Corps composed of approximately 1,363 ALJs: 1,094 from the Social Security Administration (SSA); 5 from the Department of Health and Human Services; and 264 from 28 other Agencies.

Under this proposed Bill, office space will be needed in Washington, D.C. to house the Chief ALJ and Division Chiefs who compose the Council of the proposed ALJ Corps.

And, of course, staff for the administrative heads and judges. SSA currently has a ratio of approximately 5 support staff to one ALJ; staff will be needed for the Chief Administrative Law Judge and the 8 Division Chiefs, for the Complaint Resolution Board, and for all other human resource activities such as payroll, personnel, training, recruiting and placement, labor relations, special counsel and legal staff. Staff and ALJS Will be located in regional offices, district, and other field offices, as well as Washington, D.C., "as are necessary to carry out the functions, powers, and duties of the Corps and to assign and reassign employees to such field offices."

The ALJ Corps bill further provides for training of judges in more than one subject area, initial and continuing educational programs for each ALJ in the specialized field of law of an Agency, and for continuing education and training of other employees of the Corps. Based on testimony presented at the hearing, this cost was not included in current Agency budgets and could be substantial.

The Complaints Resolution Board, and the various 5 member Panels from the Board, will need office space and staff, training, and may require payment of travel and per diem expenses to the members of the Panels. For the non-federal employees serving on the Panels, compensation "at a rate equal to the daily equivalent of the annual rate of basic pay prescribed for a position at the level of AL–3, rate C under section 5372 of the title for each day (including travel time) during which such member is engaged in the performance of the duties of the Board." Currently, the base pay for an ALJ at that level is $86,775. which, if all 16 non-federal employees were engaged in the duties of the Board for one year, creates an additional cost not currently contained in Agency budgets—a cost of $1,388,400.

An automated tracking system must also be provided for the proposed ALJ Corps which must be compatible with the current automated tracking systems of all 29 Federal Agencies. While AFGE has not had the benefit of a cost analysis of such

a system, the projection under the Reengineering process for such a system within SSA alone has been estimated in the neighborhood of $500,000,000.

Finally, there is one other cost item that may not directly affect the proposed ALJ Corps budget but one which represents a significant personnel and budget item to SSA (and possibly other Agencies), including salaries, equipment, office space, etc. The proposed ALJ Corps bill anticipates that all federal ALJs will conduct formal trial-type hearings. Currently, SSA hearing proceedings are informal, administrative, and non adversarial proceedings. The proposed ALJ Corps bill would transform SSA hearings into adversarial hearings and would represent a significant and MAJOR change in the way SSA has done business in the past. Additional costs would be incurred because SSA would need to retrain individuals and hire a substantial number of additional individuals, about 1500 full time employees (FTEs), to *present* its cases to a Federal ALJ; to *present* its policies, and to *present* other needed testimony whether vocational or medical, through witnesses, at *each* hearing. The average estimated cost of salaries alone for the 1500 FTEs would be approximately $75,000,000 annually, exclusive of other benefits to the employee. Is Congress prepared to increase SSA funding at the same time as it removes from SSA the ALJs' staff, etc. and corresponding budget to establish a proposed independent ALJ Corps? Obviously, this is an increase in cost which has not been considered and, in my opinion, the American public would not appreciate.

If SSA must cover this hidden and additional cost of presenting, and requiring testimony of various individuals, in each and every case at the hearing level to assure that the Federal ALJ is aware of specific Agency policy, which, incidentally, will probably increase the length of the proceedings, then the savings to taxpayers, projected at $22 million annually, is inaccurate. Will there be any savings?

Will H.R. 1802 Promote Efficiency or Increase Productivity?

The bill asserts that the organization of a unified Federal ALJ Corps will promote efficiency and increase productivity by the better use of judges who are now underutilized within certain federal agencies and by assigning judges, as needed, to meet specific heavy demands and workloads that may occur within specific federal agencies.

The testimony presented to the Subcommittee indicates that there are judges who are not fully utilized within certain federal agencies who could be fully used elsewhere to decrease workloads and increase productivity. However, no specific agency, or number of judges, was identified so it is unclear whether that number is one—or 5—or more. It is certain that the 1,094—of the 1,363 judges of the proposed unified ALJ Corps—who are SSA judges are not underutilized and that the hearings and appeals workload for SSA continues to climb higher and higher. Even if all the additional 269 judges were reassigned to handle SSA cases, that number would be unable to make a significant impact on the pending hearing workload or on the projected continuing heavy receipt of new requests for hearings.

It is also unclear how the establishment of the proposed ALJ Corps, as a Federal Agency, will provide for more efficient and flexible use of judges of the 29 separate agencies. H.R. 1802 establishes 8 divisions within the unified Corps. The testimony indicates that these divisions will preserve expertise. "Cross training" and assignment of cases will be made to judges within the respective divisions so that judges will hear cases arising from the same area of law rather than hearing cases solely for one Agency. Although testimony indicated that the unified Corps will be able to adjust assignment of judges to cases, with better correlation to peaks and valleys of individual Agency caseloads, *the fact is* that the flexibility of adjustment and assignment to meet demand is *only within the division* and is limited to only those Agencies within the division and/or types of cases handled within the "division." The proposed Corps bill does not contemplate movement of judges across the divisions, but rather within the divisions.

It should be further noted here that the Corps bill contains a division for Health and Human Service (HHS) programs composed of 3 departments within HHS. There are 5 ALJs in two departments of HHS currently. SSA would have been the third department. SSA is no longer a part of the HHS Agency. Still, SSA is not specifically mentioned as a division. If SSA still falls within HHS programs under the proposed Corps concept, there would be only an additional *five (5)* judges within the HHS division who could routinely be assigned SSA cases. Even if one were to contemplate judges crossing divisions and working intensively on the SSA workload, the total number of additional judges—all 269—will not be able to reduce the current SSA backlog of cases at the hearing level or to maintain *status quo* with the continuing and growing tide of requests for hearings and/or appeals filings at SSA. (Note that SSA has increased its number of ALJs by approximately 250 judges from

approximately 850 in fiscal year 1992 to approximately 1100 judges and that increased number has been insufficient to handle SSA's growing hearing workload). Additionally, to create an adversarial hearing procedure for SSA will reduce the number of cases an ALJ could possibly hear in a month, thereby, the backlog will increase. If the formation of the proposed ALJ Corps is being proffered as the solution to SSA's workload crises, then H.R. 1802 should not be passed. The answer to SSA's workload problems is not the proposed ALJ Corps.

Finally, the proposed ALJ Corps will not promote efficiency. It will add multiple administrative layers within the proposed ALJ Corps. Communication and coordination through all the various levels of all 29 Federal Agencies and departments therein, with all of the various levels of the local, district, regions, divisions, and Chief Administrative Law Judge offices will be a continuing, ongoing and necessary effort, whether it be changes in laws, regulations, policies or procedures within the Corps or the Agencies, and will impede the efficient operation of the Corps and all 29 Agencies.

Will H.R. 1802 Change the Public's Perception of Unfairness?

Actually, there has not been any solid evidence or documentation presented to the Subcommittee to show that the public believes it is not treated *fairly* by the current method employed by Agencies and the ALJs who hear and decide cases. Congressman Tom Bevill testified that the "system was bogged down" and gave an example of unfairness: telephone calls from individuals who had been denied SSA benefits or whose claim was still pending at the hearing level. It is vital to note, however, that individuals whose claims are paid timely and accurately, seldom—if ever—call a Congressman's office to report that fact. Furthermore, there is no indication that a significant number of people viewed administrative law judges as "employees" of, or "working" for, an agency or that the public viewed judges as being unduly influenced by an agency so that the decision issued was unfair.

Will H.R. *1802* Guarantee Any Greater Decisional Integrity?

Representative Paul E. Kanjorski presented testimony to the Subcommittee that "the perception remains that when the political party in power picks the heads of departments, agencies and commissions, *the bosses of the ALJs,* that the agencies will tend to abuse those powers and try to influence decisions by ALJs." (Emphasis added.) How would the perception change—i.e., that the proposed ALJ Corps would be free of political pressures? Here, again, the political party in power picks the Chief ALJ and the 8 Division Chief Judges who comprise the Council for the Corps. And, H.R. 1802 provides that "the policymaking body of the Corps shall be the Council" and is authorized "to prescribe the rules of practice and procedure for the conduct of proceedings before the Corps . . .," and "to issue such rules and regulations as may be appropriate for the efficient conduct of the business of the Corps. . . ." There is no difference between the current procedures of political appointees for the various 29 agencies and that proposed under H.R. 1802.

The Administrative Procedure Act guarantees decisional integrity. The creation of an ALJ Corps will not further strengthen that guarantee. Rather, it appears that the question surrounding "decisional integrity" is whether an ALJ must follow Agency policy, procedures and rules. H.R. 1802 does not relieve the ALJ from applying such policy, etc. but requires that such policy be presented in a formal, adversarial process to the ALJ for his consideration and decision. The Agency may still review the ALJ's decision. Perhaps the question—or concern—should be whether the ALJ, and the ALJ Corps, may set Agency policy through its decisions rather than adhere to the policy, procedures, etc. set by an Agency?

SSA Initiatives

Finally, it must be noted that the Social Security Administration has been actively involved in reviewing its processing of disability claims, including the appeals process, and has implemented, or will soon implement, certain initiatives, short-term and long-term plans, designed to reduce the backlog and gain control over the increasing number of request for hearings and appeals which are being filed by claimants.

SSA currently has implemented a Redeployment Program to place non-direct service workload employees who are currently in administrative (i.e., staff) and managerial and supervisory positions into direct service workload positions in SSA and is in the process of developing a plan for the reduction of duplication of administrative functions by reducing the number of regional offices from ten to not more than five regional offices.

The enactment of H.R. 1802, at this point in time, will not promote efficiency, increase productivity, reduce administrative functions, provide economies of scale or provide better public service and public trust in the administrative resolution of disputes—for SSA—or any other of the 29 agencies and will necessarily create additional cost in terms of manpower, time, and budget both for the Corps and SSA. SSA currently has plans for reducing administrative (i.e., staff) and managerial and supervisory positions by placing non-workload employees into direct service workload positions in SSA and plans for a reduction from 10 regional offices to at least five regional offices. SSA, therefore, has a plan to reduce any duplication of administrative staff within offices and regions. This is not the time for an ALJ Corps. It would prove disruptive of current plans in progress, not just within SSA, but within other agencies as well and carries no guarantee that it will be any more successful than the hearing processes currently utilized within the 29 agencies or that it will change any perceptions of ALJs currently held by members of the public or that better service will be provided.

H.R. 1802 will not promote efficiency, increase productivity, reduce administrative functions, provide economies of scale or provide better public service and public trust in the administrative resolution of disputes—for SSA—or any of the other 29 agencies, but will necessarily create additional costs for the Corps, SSA, and other agencies.

Final Comments

There are two other areas in which I believe comments are appropriate. At the hearing on July 26, 1995, Judge Christine Moore of the Federal Administrative Law Judges Conference (FALJ) expressed a concern that the appropriations cap written into H.R. 1802 might "impair the efficiency, productivity and delivery of due process to the public, given that judges do not control their incoming caseloads." The Chair addressed such concern by stating that the Corps would be under Congressional over site and that additional or appropriate funding might be forthcoming.

On the other hand, AFGE Council 215 has been appalled that the Appropriations Committee of Congress has and continues to cut SSA's budget requests. As set forth in the Report of the Committee on Appropriations, Report 104–209, dated July 27, 1995, Congress has reduced SSA's budget request for fiscal year 96 by $300,000,000. This includes a reduction in funding for administrative expenses, for the disability initiative to streamline the disability processes and improve service for disabled individuals applying for and receiving disability benefits under Title II and Title XVI, including a reduction in agency employment—by 5,000 employees—and a reduction in funding an automation initiative. It should be noted here that SSA and its employees, like the judges, do not control their incoming caseloads. But SSA is and has been penalized by Congress by a decrease in funding and a mandate to reduce the number of employees in a situation where it has no control over the timing or the filing of applications and requests for hearings or appeals.

The second matter concerns the guarantees in H.R. 1802 relating to reassignments and details of judges and staff members of the Corps. The Bill guarantees that "A judge or staff member of the Corps on the date of commencement of the operation of the Corps, and all new judges and staff members appointed by the Council, may not thereafter be involuntarily reassigned to a new permanent duty station if such station is beyond the commuting area of the duty station which is the judge's or staff member's permanent duty station on that date. A judge or staff member of the Corps may be temporarily detailed, once in a 24-month period, to a new duty station at any location, for a period of not more than 120 days."

That guarantee is not made under the Bill to support personnel who are transferred to the Corps. Rather, the Council has the power and authority "to establish, abolish, alter, consolidate and maintain such regional, district, and other field offices as are necessary to carry out the functions, powers and duties of the Corps *and to assign and reassign employees to such field offices;* . . ." *(Emphasis added.)*

Furthermore, it is possible that, with the stroke of a pen on the day after H.R. 1802 becomes effective, "the Administrative Law Judge Corps of the United States or a judge thereof in the exercise of authority vested in the Corps or its members by this Act, . . ." may modify, terminate, supersede, set aside or repeal "(A)ll orders, determinations, rules, regulations, permits, contracts, *collective bargaining agreements, recognition of labor organizations,* . . . *and privileges which have been issued, made, granted, or allowed to become effective in the exercise of any duties, powers or functions which are transferred under this Act." (Emphasis added.)*

AFGE Council 215 asserts that this section of the bill exhibits a total disregard for any contractual and statutory rights of support personnel, i.e., bargaining unit employees, who are transferred into the ALJ Corps. The rights of bargaining unit

employees are the rights gained through negotiations of National Agreements, or through past practices, which have evolved over time within each Agency, or through the Statutes. Bargaining unit employees need to know that the rights which respective Unions have gained for them over many, many years cannot be taken away by the stroke of a pen, leaving such employees without any continuity in their working lives, but rather, solely within the power of an ALJ Corps who could unilaterally and arbitrarily change the conditions of employment on an hourly, daily, weekly basis.

I submit to you, this is not a "cost savings bill" but an additional increased tax burden to the taxpayers.

Thank you for your attention and consideration to the matters raised herein in opposition to H.R. 1802.

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